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v.
Julie Duncan

Docketed: September 14, 2000 Court: United States Court of Appeals for the Ninth Circuit

Entry	Date	Proceedings and Orders
	Sep 13 2000	Petition for writ of certiorari filed. (Response due October 14, 2000)
	Oct 16 2000	Brief of respondent Julie Duncan in opposition filed.
	Oct 16 2000	Brief amicus curiae of Air Transport Association of America filed.
	Oct 31 2000	Reply brief of petitioner Northwest Airlines, Inc. filed.
	Nov 1 2000	DISTRIBUTED for Conference of November 22, 2000
	Nov 27 2000	REDISTRIBUTED for Conference of December 1, 2000
	Dec 4 2000	REDISTRIBUTED for Conference of December 8, 2000
	Dec 11 2000	Petition DENIED. Dissenting opinion by Justice O'Connor with whom the Chief Justice and Justice Thomas join. (Detached opinion.)

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No. ——

IN THE

Supreme Court of the United States

NORTHWEST AIRLINES, INC.,
Petitioner,

v.

JULIE DUNCAN,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Section 105(a)(1) of the Airline Deregulation Act preempts all state laws and regulations "related to a price, route or service of an air carrier." 49 U.S.C. § 41713(b)(1). The question presented is whether the court below erred when it held, in conflict with other courts of appeals, that a state may regulate any "service" provided on an international or interstate flight if the service does not involve price or route determinations.

LIST OF PARTIES AND CORPORATE DISCLOSURE STATEMENT

The caption of this case contains the names of all parties that were before the United States Court of Appeals for the Ninth Circuit and the United States District Court for the Western District of Washington.

Petitioner Northwest Airlines, Inc. is an indirect, wholly owned subsidiary of Northwest Airlines Corporation, a publicly traded company. As of December 31, 1999, based on a Schedule 13G filed with the Securities and Exchange Commission, AXA Financial, Inc. (formerly known as the Equitable Companies Incorporated), through subsidiaries and affiliates, had a beneficial ownership of more than 10% of the common stock of Northwest Airlines Corporation.

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IN THE

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No. _____

NORTHWEST AIRLINES, INC.,

Petitioner,

v.

JULIE DUNCAN,

Respondent

Petition for a Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioner Northwest Airlines, Inc. ("Northwest") respectfully requests this Court to issue a writ of certiorari to review a decision of the United States Court of Appeals for the Ninth Circuit. In that decision, the Ninth Circuit adopted an interpretation of the Airline Deregulation Act that conflicts both with the rule in other circuits and with the intent of Congress because it allows states to regulate or prohibit any airline policy regarding a "service" not directly related to fares or routes, even if the policy was adopted in order to compete in the deregulated marketplace Congress sought to foster.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Ninth Circuit, reported at 208 F.3d 1112 (9th Cir. 2000), is reprinted at Pet. App. 1a. The unreported order of the United States District Court for the Western District of Washington is reprinted at Pet. App. 9a. The unpublished order of the United States Court of Appeals for the Ninth Circuit denying rehearing and rehearing *en banc* is set forth at Pet. App. 19a.

JURISDICTION

Northwest properly removed this suit to the United States District Court for the Western District of Washington pursuant to 28 U.S.C. §§ 1441, 1446. Jurisdiction in the district court was proper under 28 U.S.C. § 1332(a). The Ninth Circuit had jurisdiction to review the district court's dismissal of the case pursuant to 28 U.S.C. § 1291. The Ninth Circuit issued its decision on April 6, 2000. Northwest timely filed a petition for rehearing and rehearing *en banc*, which was denied on June 16, 2000. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

This case involves section 105(a)(1) of the federal Airline Deregulation Act ("ADA"), now codified at 49 U.S.C. § 41713(b)(1), which provides as follows:

> Preemption – Except as provided in this subsection, a State, political subdivision of a State, or political authority of at least 2 States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier that may provide air transportation under this subpart.

Pet. App. 20a.

STATEMENT

Petitioner Northwest Airlines seeks review of a ruling by the Ninth Circuit that dramatized and exacerbated a long-standing and explicit conflict among the circuits over the proper interpretation of section 105(a)(1) of the ADA, 49 U.S.C. § 41713(b)(1), in which Congress preempted any provision of state law relating to an airline's "price, route, or service." Because that conflict will not disappear absent action by this Court, and because the current disarray in the law is both unworkable – from the point of view of airlines operating in an interstate environment – and inconsistent with the will of Congress, the argument for a grant of review in this case is compelling.

This case was filed by a flight attendant in state court in Washington, alleging, on behalf of a proposed class of flight attendants on Northwest's trans-Pacific flights, that Northwest was liable under state tort law for allowing passengers to smoke on those flights. At the time the action was filed, Northwest did not allow smoking on domestic flights or on many international flights but, consistent with federal regulations,[1]

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[1]Under 14 C.F.R. Part 252, federal authorities have regulated on-board smoking for decades. Until this year, those federal regulations permitted smoking on international flights, subject to certain restrictions. This past June, the regulations were amended to ban smoking on flights of domestic air carriers originating or terminating in the United States. 65 Fed. Reg. 36772 (June 9, 2000). A similar ban applicable to foreign air carriers is subject to potential waiver if the applicable foreign governments object to

did allow smoking on some Asian flights. It was acknowledged by respondent, Pet. App. 22a-23a, that Northwest adopted this service policy because it was necessary to compete with foreign air carriers that allowed smoking on the same routes. Respondent alleged that this service policy was, nevertheless, a breach of Northwest's duty, under state tort law, to provide a safe and healthy working environment.

The case was removed to federal court, and the district court dismissed the case as preempted by section 105(a)(1), reasoning that allowing respondent's tort claim to proceed would be tantamount to allowing state regulation of a "service" provided to Northwest customers on trans-Pacific flights. Pet. App. 15a-17a. The district court's ruling was based on then-applicable Ninth Circuit case law, which in turn was based on the Fifth Circuit's *en banc* ruling in *Hodges v. Delta Airlines, Inc.*, 44 F.3d 334 (5th Cir. 1995). Pet. App. 12a-17a (citing *Gee v. Southwest Airlines*, 110 F.3d 1400, 1404-07 (9th Cir. 1997), *overruled on other grounds by Charas v. Trans World Airlines Co.*, 160 F.3d 1259 (9th Cir. 1998)). *Hodges*, in essence, established the rule that states may not regulate airline decisions about "services," broadly defined, but that tort suits challenging the manner in which a service was performed on a given day are permissible. While the case was pending on appeal, however, the Ninth Circuit issued an *en banc* decision in *Charas v. Trans World Airlines, Inc.*, 160 F.3d 1259 (9th Cir. 1998), *amended*, 169 F.3d 594 (9th Cir. 1999), which radically altered the governing standards in that circuit.

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the extraterritorial application of United States law. *Id.* During the pendency of this case, but prior to the imposition of the new federal regulations, Northwest made a decision to ban smoking on all flights, including those to and from Asia.

Charas started with the proposition that the ADA preemption provision should be interpreted in light of the congressional goal of shielding the newly deregulated airlines from re-regulation by the states. It then held that preemption of "run-of-the-mill personal injury claims" arising from negligent operations would not further the goal of preserving deregulation and promoting competition. 160 F.3d at 1261. Finally, the court concluded that the only way to limit the scope of section 105(a)(1) (and thus save personal injury claims from preemption) is to interpret the term "service" in that section as adding nothing to the prior terms "price" and "route." As a result, although section 105(a)(1) preempts state laws that relate to an airline's "price, route *or* service," (emphasis added) the *Charas* court interpreted "service" as encompassing only matters that would already be preempted as involving airline "routes" – "such things as the frequency and scheduling of transportation, and . . . the selection of markets to or from which transportation is provided," *Id.* at 1265-66. Because that definition of "service" conflicted with *Hodges*, *Charas* expressly overruled two Ninth Circuit cases that had relied on *Hodges*, and the opinion acknowledged that it was creating a direct conflict with *Hodges*. *Id.* at 1261, 1263.

In the present case, a panel of the Ninth Circuit then applied *Charas*, not to a "run-of-the-mill personal injury claim," *id.* at 1261, but to a claim challenging an airline service *policy* of allowing smoking on certain flights. It held that such a policy was also fully exposed to state regulation through tort law. In so doing, the Ninth Circuit underscored its position about the superfluousness of the term "service" in the statute. Writing for the panel, Judge Reinhardt stated that the Northwest policy of allowing smoking on trans-Pacific flights did not involve a "service" protected from state regulation, because it was not "a decision dealing with 'the frequency and

scheduling of transportation, [or] the selection of markets to or from which transportation is provided.'" Pet. App. 5a (quoting *Charas*, 160 F.3d at 1265-66).

Thus, the court applied a definition of "service," which it initially adopted in *Charas* for the stated purpose of limiting preemption to matters that affect airline competition, to preserve a state-law challenge to an airline service policy that was implemented by Northwest in order to "meet the competition." And it then went further, holding that a state-law tort claim would not be preempted even if it could be shown to have the potential to force an airline to re-route its flights to another state in order to avoid liability. The court explained that such a causal connection to airline "routes" would be "too tenuous" to warrant preemption. Pet. App. 6a-7a. Thus, in the wake of the ruling below, the only state tort claims that would be preempted under section 105(a)(1) would be claims directly challenging an airline's decision to set a particular price or fly a particular route.

REASONS FOR GRANTING THE WRIT

This case presents a question of fundamental importance concerning the proper interpretation of section 105(a)(1) of the ADA, which preempts any state "law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier." 49 U.S.C. § 41713(b)(1). Since this Court's decisions in *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992), and *American Airlines, Inc. v. Wolens*, 513 U.S. 219 (1995), serious and persistent disagreements have emerged in circuit court cases applying section 105(a)(1) to state tort claims. Those disagreements include both divergent views about the basic mode of analysis that should be applied and a specific conflict over the meaning

of the statutory term "service." This conflict will not resolve itself because the two principal approaches to interpreting the statute are based on *en banc* rulings of the Fifth and Ninth Circuits, each of which has been repeatedly endorsed by other circuits. As a result, absent intervention by this Court, airlines will continue to have to deal with two quite distinct legal regimes, depending on which circuit's law happens to apply.

The evident confusion in the lower courts would be reason enough to justify a grant of review even if both of the competing rules were arguably defensible. But the problem is even more serious because, as this case illustrates, the Ninth Circuit has adopted such a narrow interpretation of the ADA preemption provision that the statutory goals of Congress are being frustrated. It is the Ninth Circuit that strongly emphasized in *Charas* the need to apply section 105(a)(1) with an eye to the congressional goal of promoting competition among the airlines in a newly deregulated environment. But in its zeal to limit the scope of preemption to matters affecting competition, the Ninth Circuit in *Charas* went much too far when it excluded from preemption all tort claims – and all other forms of state regulation – not directly related to an airline "price" or "route."

The effect of that exclusion was dramatized in this case, where the Ninth Circuit confirmed its rule that the third statutory term – "service" – is always treated as mere surplusage, adding nothing to the scope of the preemption provision, even where such a narrow statutory interpretation flatly *disserves* the congressional goal of promoting free competition. Thus, in the Ninth Circuit, state regulation of airline policies relating to smoking, service of alcohol, overbooking, boarding of passengers and other matters not directly involving prices or routes may proceed unfettered,

even where the policies subject to attack were adopted for the sole purpose of "meeting the competition." Meanwhile, in several other circuits, it is well established that such state law causes of action would be preempted. *See, e.g., Hodges*; *Smith v. Comair, Inc.*, 134 F.3d 254 (4th Cir. 1998).

The ruling below also extended *Charas* in another extraordinary way. The Ninth Circuit held that, even if a cause of action under a state's tort law were so burdensome that it effectively forced airlines to alter their routes to avoid that state, that would not be enough to justify preemption. Here again, it seems likely that the court's rule will disserve the statutory goals – and it is certain that other circuits applying section 105(a)(1) would not ignore the practical but indirect impact of a state law on airline route decisions.

The inevitable result of allowing the circuit conflicts to linger will be to leave in place a checkerboard of state regulation, requiring airlines to vary their policies from place to place as they attempt to compete for passengers while adhering to the most restrictive state rule that might be applied to a given flight between two different states. The Court should step in to restore uniformity in an area where it is a practical necessity. This case, involving an airline policy that was adopted for the purpose of competing with foreign carriers and would be shielded from preemption under one of the competing approaches to interpreting the Act but not the other, provides an excellent and timely vehicle for addressing these important issues.

I. The Circuits Are in Fundamental and Irreconcilable Conflict Over the Proper Interpretation of the ADA Preemption Provision.

A. The Emergence and Scope of the Conflict

The conflict among the circuits at issue here involves forms of state regulation not at issue in the two cases where this Court applied the ADA preemption provision and established a basic framework for the preemption analysis. First, in *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 391 (1992), the Court held that section 105(a)(1) bars states from enforcing their general consumer protection statutes through state-created guidelines aimed at prohibiting false and misleading airfare advertising. The *Morales* Court recognized that Congress in the ADA sought to place "'maximum reliance on competitive market forces'" and intended the preemption provision "[t]o ensure that the States would not undo federal deregulation with regulation of their own." *Id.* at 378 (quoting 49 U.S.C. App. §§ 1302(a)(4), 1302(a)(9)) (alterations in original). The Court then noted that the words of section 105(a)(1) "express a broad preemptive purpose," *id.* at 383, and therefore rejected the argument that the ADA preempted only state laws that specifically address the airline industry. Instead, the Court made clear that the ADA's preemption provision applies with equal force to general laws that are "not specifically designed to affect" rates, routes, or services but have such an effect directly or indirectly. *Id.* at 386 (internal quotation and citation omitted).

Applying this analysis, the Court recognized that, while "'[s]ome state actions may affect [airline fares] in too tenuous, remote or peripheral a manner' to have preemptive effect," *id.* at 390 (quoting *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 100

n.21 (1983)) (alteration in original), "the obligations imposed by the [advertising] guidelines would have a significant impact upon the airlines' ability to market their product, and hence a significant impact upon the fares they charge." *Id.* Accordingly, the state advertising regulations were preempted.

Three years later, in *American Airlines, Inc. v. Wolens*, 513 U.S. 219 (1995), this Court dealt with state law challenges to an airline's retroactive modification of its frequent flyer program. The Court held that the plaintiffs' fraud claims were preempted. *Id.* at 228.[2] Applying the language of section 105(a)(1), it concluded that those claims related both to the airline's "rates," in the form of mileage credits for free tickets, and to the "service" of access to flights and class upgrades. *See id.* at 226.

In the wake of *Morales* and *Wolens*, a striking conflict among the circuits has developed concerning the proper application of section 105(a)(1) to other kinds of state law tort claims and concerning the meaning of the term "service" in that section. *See, e.g., Taj Mahal Travel, Inc. v. Delta Airlines, Inc.*, 164 F.3d 186, 192 (3d Cir. 1998) ("In the absence of definitive guidance from the Supreme Court, the Courts of Appeals have struggled with the relationship between the [Airline Deregulation] Act's preemption clause and state tort claims."); *Hobbs v. Labor Comm'n*, 991 P.2d 590, 594 n.6 (Utah Ct. App. 1999) ("Currently there is no single interpretation of what is encompassed by the term 'service' [in the ADA]."); *Woodson v. U. S. Airways, Inc.*, 67 F. Supp. 2d

[2]The Court held that the plaintiffs' contract claims were not preempted, however, because a state's enforcement of private contractual obligations simply holds parties' to their own agreements and does not constitute a "law" relating to a price, route or service of an air carrier within the meaning of the ADA's preemption clause. *See Wolens*, 513 U.S. at 228-33.

554, 557 (M.D.N.C. 1999) ("courts interpreting the scope of preemption under the ADA have failed to reach consistent results"); *Galbut v. American Airlines, Inc.*, 27 F. Supp. 2d 146, 151 (E.D.N.Y. 1997) ("Based on the *Morales* ruling, the scope of the word 'services' has proven critical in preemption analysis with respect to tort claims, although no singular definition has emerged despite repeated scrutiny" (citing cases)).

One leading interpretation was enunciated by the *en banc* Fifth Circuit in *Hodges*. There, the plaintiff brought a personal injury tort suit for injuries suffered when an object fell out of an overhead bin. In determining whether the plaintiff's claim "related to a price, route or service of an air carrier," the *Hodges* court defined the term "service" broadly as follows:

> "Services" generally represent a bargained-for or anticipated provision of labor from one party to another. If the element of bargain or agreement is incorporated in our understanding of services, it leads to a concern with contractual arrangement between the airline and the use of the service. *Elements of the air carrier service bargain include items such as ticketing, boarding procedures, provision of food and drink, and baggage handling*, in addition to the transportation itself. These matters are all appurtenant and necessarily included with the contract of carriage between the passenger or shipper of the airline. It is these [contractual] features of air transportation that we believe Congress intended to de-regulate as "services" and broadly to protect from state regulation.

44 F.3d at 336 (emphasis added and alteration in original).[3]

[3] This definition was derived in large part from statements issued by the Civil Aeronautics Board ("CAB") implementing section 105(a)(1). 44 F.3d at 337. According to the CAB,

Next, drawing on this Court's *Morales* decision, *Hodges* held that only those tort claims that make specific reference to airline services or "significantly affect" such services are preempted. *Id.* at 340. Applying this standard in light of its broad definition of "services," the court then distinguished between tort claims that concern an airline's *policy* of providing a given service and those that go only to the *manner* in which those services are provided. Only the former would "significantly affect" the airline's services and be preempted. *Id.* at 339-40. The latter, which the court characterized as claims concerning the "operation and maintenance" of the aircraft, would not. *Id.*

As an example of tort claims preempted under this standard, the court reaffirmed its earlier holding in *O'Carroll v. American Airlines, Inc.*, 863 F.2d 11 (5th Cir. 1989). There, the plaintiffs, who had been removed from a flight for being intoxicated and disruptive, sued under state tort law for having been wrongfully evicted from the flight. According to the *Hodges* court, the *O'Carroll* plaintiffs' claims were properly held preempted: "[e]nforcement of O'Carroll's state law claims would result in significant de facto regulation of the airlines'

> [P]reemption extends to all of the economic factors that go into the provision of the *quid pro quo* for passenger's fare, including flight frequency and timing, liability limits, reservation and boarding practices, insurance, smoking rules, meal service, entertainment, bonding and corporate finance. . . . [A] state may not interfere with the services that carriers offer in exchange for their rates and fares. For example, liquidated damages for bumping (denial of boarding), segregation of smoking passengers, minimum liability for loss, damages and delayed baggage, and ancillary charges for headsets, alcoholic beverages, entertainment, and excess baggage would clearly be "service" regulation within the meaning of section 105.

44 Fed. Reg. 9948, 9951 (Feb. 14, 1979).

boarding practices and, moreover, would interfere with federal law granting the airlines substantial discretion to refuse to carry passengers." 44 F.3d at 339 (citing 49 U.S.C. App. § 1511(a)).

By contrast, the personal injury negligence claim in *Hodges* related not to the airline's policy concerning its baggage services, but only to the manner in which those services were rendered. Accordingly, the plaintiff's claim would not "significantly affect" the airline's baggage services within the meaning of the ADA and was not, therefore, preempted. *Id.* at 340.

Hodges was followed by the Seventh Circuit in *Travel All Over The World, Inc. v. Kingdom of Saudi Arabia*, 73 F.3d 1423 (7th Cir. 1996). There, after noting the considerable confusion in the lower courts over the ADA's preemptive reach, *see id.* at 1433 (citing cases arriving at inconsistent results in slander and defamation cases), the court adopted the Fifth Circuit's broad definition of "service" as used in section 105(a)(1) of the ADA. *Id.* In addition, the court held, consistent with the Fifth Circuit's analysis in *Hodges*, that a claim relates to an airline's services and therefore is preempted if it has a "significant economic effect" on those services. *Id.* at 1432-33.

Applying this test, the Seventh Circuit held that the plaintiff travel agency's slander and defamation claims against an airline were not preempted. *See id.* at 1433. By contrast, the court held that the plaintiff's intentional tort claims, based on the airline's refusal to honor the tickets issued by plaintiff, were preempted because they "expressly referr[ed] to airline 'services,' which include ticketing as well as the transportation itself." *Id.* at 1434.

The Eleventh Circuit has also adopted the Seventh Circuit's "significant economic effect" test, originally derived from *Hodges*. *Parise v. Delta Airlines, Inc.*, 141 F.3d 1463, 1465-66 (11th Cir. 1998) (citing *Travel All Over the World*, 73 F.3d at 1431). And the Fourth Circuit has likewise expressly adopted the broad definition of "service" announced in *Hodges*. In *Smith v. Comair, Inc.*, 134 F.3d 254 (4th Cir. 1998), the plaintiff passenger sued the defendant airline for intentional torts and breach of contract arising out of the airline's refusal to allow him to board after he failed to produce proper identification. Citing *Hodges*, the court concluded that, "[u]ndoubtedly, boarding procedures are a service rendered by an airline." *Id.* at 259 (citing *Hodges*, 44 F.3d at 336; *Chukwu v. Bd. of Dirs. of British Airways*, 889 F. Supp. 12, 13 (D. Mass. 1995), *aff'd mem.*, 101 F.3d 106 (1st Cir. 1996)). Thus, to the extent that the plaintiff's intentional tort claims were based on the airline's "boarding practices," they were preempted. *Id.* Consistent with *Hodges*, however, the court also made clear that, in contrast to claims concerning an airline's policies or practices, "[s]uits stemming from outrageous conduct on the part of an airline toward a passenger will not be preempted under the ADA if the conduct too tenuously relates or is unnecessary to an airline's services." *Id.* (citing *Rombom v. United Air Lines, Inc.*, 867 F. Supp. 214, 222, 224 (S.D.N.Y. 1994)).[4]

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[4] A number of federal district courts in other circuits have adopted and applied the definitions and reasoning of the Fifth, Seventh, Fourth and Eleventh Circuits. *See e.g.*, *Chukwu v. Bd. of Dirs. of British Airways*, 889 F. Supp. 12, 13-14 (D. Mass. 1995), *aff'd mem.*, 101 F.3d 106 (1st Cir. 1996) (citing *Hodges* and adopting Fifth Circuit's definition of services); *Galbut*, 27 F. Supp. 2d at 152 (citing *Travel All Over The World* to support proposition that upgrade is a "service").

As noted above, the *en banc* Ninth Circuit in *Charas* broke ranks with all of these circuits that have followed the *Hodges* approach. Unlike the Fifth and Seventh Circuits' "significant economic effect" test, the test fashioned in *Charas* limits the ADA's preemptive force to state laws "adversely affect[ing] the economic deregulation of the airlines and forces of competition within the airline industry." 160 F.3d at 1261. Moreover, the court went on to hold that "[l]ike 'rates' and 'routes,' Congress used 'service' in § 1305(a)(1) in the public utility sense -- i.e., the provision of air transportation to and from various markets at various times." *Id.* at 1266. The court explained:

> Congress used the word "service" in the phrase "rates, routes, or service," in the ADA's preemption clause to refer to the prices, schedules, origins and destinations of the point-to-point transportation of passengers, cargo, or mail. In the context in which it was used in the Act, "service" was not intended to include an airline's provision of in-flight beverages, personal assistance to passengers, the handling of luggage, and similar amenities.

Id. at 1261. Elsewhere, the court explained that ""service,' when juxtaposed to 'rates' and 'routes,' refers to such things as the frequency and scheduling of transportation, and to the selection of markets to or from which transportation is provided (as in, 'This airline provides service from Tucson to New York twice a day.')"). *Id.* at 1265-66.

In addition to adopting this narrow definition of "service" – one that renders the term virtually synonymous with the word "route" – the Ninth Circuit in *Charas* also expressly rejected as unworkable the *Hodges* court's distinction between an airline's policy to provide a service and the performance of a service through the "operation and maintenance" of its aircraft.

Id. at 1263 (citing and expressly rejecting *Hodges*, 44 F.3d at 336-37).

The Ninth Circuit's analysis was adopted by the Third Circuit in *Taj Mahal Travel, Inc. v. Delta Airlines, Inc.*, 164 F.3d 186 (3d Cir. 1998). After exhaustively surveying the disagreements among the circuits, the Third Circuit chose to follow *Charas* and held that "the proper inquiry is whether a common law tort remedy frustrates deregulation by interfering with competition through public utility-style regulation." *Taj Mahal Travel*, 164 F.3d at 194 (citing *Charas*, 160 F.3d at 1265-66). Thus, like the Ninth Circuit, the Third Circuit broadly concluded that "preemption is inappropriate in the tort field."[5] *Id.* The Third Circuit further joined in the Ninth Circuit's rejection of the Fifth Circuit's distinction between service policies and the operation of the aircraft. *Id.*[6]

Now, in the instant case, the Ninth Circuit has exacerbated the interpretive rift between it and some of its sister circuits.

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[5]The Third Circuit found support for this proposition in the savings clause of the Federal Aviation Act ("FAA"), 49 U.S.C. App. § 1506. 164 F.3d at 194. *But see Morales*, 504 U.S. at 384-85 (rejecting argument that Court could look to FAA's savings clause for guidance in applying the ADA's preemption provision to tort claims); *Wolens*, 513 U.S. at 232 (ADA's preemption provision and FAA's savings clause together permit states to enforce contracts made by airlines but prevents states from "imposing their own substantive standards with respect to rates, routes, or services" through application of their tort law).

[6]Compounding the prevailing confusion, while the Third Circuit joined the Ninth Circuit's analysis in *Charas*, which was motivated by a desire to avoid preemption of routine personal injury claims, the Third Circuit held more recently in *Abdullah v. American Airlines, Inc.*, 181 F.3d 363, 367 (3d Cir. 1999), that the entire field of airline safety is preempted as a matter of field preemption under the FAA.

Applying *Charas*'s definition of "services," Judge Reinhardt stated that an airline's deliberate policy of allowing smoking is not a "service" protected from state regulation by the ADA because "[a]n airlines' decision to permit (or not to permit) smoking on a flight is not a decision dealing with 'the frequency and scheduling of transportation, [or] the selection of markets to or from which transportation is provided.'" Pet. App. 5a (alteration in original) (quoting *Charas*, 160 F.3d at 1265-66).[7]

The Ninth Circuit then went on to create a bright-line rule that the threat of a state-law personal-injury action can never have a sufficient impact on airlines operating to justify preemption – *i.e.*, that "the connection between an award in a tort case and an airline's 'services' is simply too tenuous" to justify preemption under the ADA. Pet. App. 6a-7a. In so doing the court made clear that, even where it could be demonstrated that the application of state tort law *would* significantly impact an airline's services by forcing it to re-route its flights, the "causal relationship" between a tort suit and the airline's routes and services "is not sufficient to invoke preemption under § 1305(a)(1)." *Id.* at 6a.[8]

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[7]This conclusion is patently at odds with CAB regulations implementing the ADA. *See supra*, p. 12 n.3.

[8]The Second Circuit has adopted somewhat of a hybrid rule, combining elements of the Ninth and Third Circuits' approach with that of the Fifth, Seventh, Fourth and Eleventh Circuits. In *Abdu-Brisson v. Delta Airlines, Inc.*, 128 F.3d 77 (2d Cir. 1997), it held, like the Ninth Circuit, that the primary focus of the preemption analysis must be congressional intent, which it characterized as preempting laws that "affect competition between airlines." *Id.* at 84. At the same time, however, the court rejected application of any bright-line rule and insisted on a case-by-case approach to ascertain "whether the dangers and hardships of diverse regulation justify

(continued...)

Given the depth of the disagreement among the circuits, there is little reason to suppose that the conflict will resolve itself. For example, the Ninth Circuit in this case declined to review *en banc* the panel's rather extreme application of *Charas*. And in *United Airlines, Inc. v. Mesa Airlines, Inc.*, 219 F.3d 605 (7th Cir. 2000), the Seventh Circuit recently had occasion to comment on the circuit conflict, and pronounced that "nothing any other circuit has said about the subject persuades us to alter course." *Id.* at 609. Specifically, the court reaffirmed the broader test it had adopted in *Travel All Over The World*, providing that a claim is preempted if either the state['s] rule expressly refers to air carriers' rates, routes, or services, or application of the state's rule would have 'a significant economic effect upon them.'" *Id.* (quoting *Travel All Over The World*, 73 F.3d at 1432). In doing so, the court expressly rejected the Third Circuit's more restrictive formulation (borrowed from the Ninth Circuit's decision in *Charas*) that "state law is preempted by § 105(a)(1) only if it 'frustrate[s] Congressional intent [or] impose[s] a state utility-like regulation on the airlines.'" *Id.* at 608-09 (quoting *Taj Mahal Travel*, 164 F.3d at 195) (alteration in original).[9] Indeed, the Seventh Circuit concluded that the ADA's preemption provision "applies according to its text, rather than according to goals and motives imputed to legislators," and thus preempts

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[8](...continued)
foreclosing a State from the exercise of its traditional powers." *Id.* (internal quotations omitted). Thus, unlike the Ninth Circuit's rigid formulation, the Second Circuit's analysis made clear that, if application of a state's tort-like human rights laws did in fact frustrate Congress's deregulatory goals, that application of state law would be preempted under the ADA. *Id.* at 84-86.

[9]As the *Mesa Airlines* court recognized, the general anti-fraud statute held preempted in *Wolens* was "a long distance from 'utility-like regulation.'" *Id.*

even claims not inconsistent with the intent of Congress in enacting the ADA. *Id.* at 611 (citing *Wolens*).

B. The Practical Impact of the Conflict

There is a pressing need for action by this Court to resolve the conflicts among the circuits. The circuits' dramatically differing interpretations of section 105(a)(1) have real and immediate implications for the entire airline industry.

A good example is the area of an airline's boarding policies. In the Ninth Circuit, there is no preemption of state regulation of any airline policy or practice absent a direct link to an airline's decisions involving rates or routes. *See Charas*, 160 F.3d at 1261, 1265-66. It follows that a claim that an airline wrongfully denied a passenger boarding – even if based on an airline's policy related to such things as overbooking, disability, or intoxication – would not be preempted.[10] *See Newman v. American Airlines, Inc.*, 176 F.3d 1128, 1131 (9th Cir. 2000) (applying *Charas* and holding that discrimination claim based on refusal to board passenger with heart condition absent medical certificate was not preempted because it did not relate to routes or rates). Indeed, states would be free to adopt regulations micro-managing such matters as whether airlines may permit first-class passengers to board first.

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[10]Under the Ninth and Third Circuit's narrow definition of services, states apparently are now free to pass laws *directly* regulating most aspects of air travel including not only laws prescribing boarding procedures but also, for example, laws that would limit the number of allowed carry-on bags, the number of alcoholic beverages served or the categories of in-flight entertainment available in each cabin of the plane. It could be argued that none of these relates to prices or routes and thus none is preempted.

By contrast, the Fourth Circuit had little difficulty concluding that, under the principles set forth in *Hodges* and *Travel All Over the World,* boarding practices are a "service" under the ADA, and a claim based on refusing to allow a passenger to board due to a ticket agent's failure to check for photo identification is preempted. *See Smith*, 134 F.3d at 259; *see also Hodges*, 44 F.3d at 336 (defining "services" to include "boarding practices" and reaffirming Fifth Circuit precedent that such claims are preempted).

Other examples, involving state regulation of policies ranging from food and beverage service to baggage handling to flight security, could easily be elaborated. In each case, the split among the circuits means that very different rules will apply in different places.

The bottom line point is that the nation's leading air carriers serve cities and passengers in every state, every day. It is intolerable that these carriers should simultaneously be subject to such divergent interpretations of controlling federal law – particularly when one of those interpretations undermines the very freedom of competition that Congress sought to preserve. Airlines should not have to tailor their operations to comply with the most restrictive state law rules that might be applied to a given flight. As Judge Easterbrook succinctly put it, "applying the conflicting tort principles of 50 different states to the[] interstate and international transactions [of air carriers] would make a mess of things. Preemption under § 105(a)(1) enables a system of private law, with nationally uniform overrides, to flourish." *Mesa Airlines*, 219 F.3d at 611.

II. The Ninth Circuit's Rules Are Particularly Problematic Because They Expose Airlines to Forms of State Regulation Congress Clearly Intended to Preempt.

In addition to the need to resolve the conflict among the circuits, the need for review in this Court is especially pronounced because the Ninth Circuit's approach is clearly wrong. First, as a textual matter, the Ninth Circuit's interpretation of the word "service" reads that word out of the ADA altogether. It is a "cardinal rule of statutory interpretation that no provision should be construed to be entirely redundant." *Kungys v. United States*, 485 U.S. 759, 778 (1988) (plurality opinion of Scalia, J.). *See also Exxon Corp. v. Hunt*, 475 U.S. 355, 369 n.14 (1986) (rejecting reading of statute that would render word superfluous). Nevertheless, the Ninth Circuit has adopted a definition of the word "service" that renders it entirely redundant of the immediately preceding word "route." Pet. App. 5a ("'service,' when juxtaposed to 'rates' and 'routes,' refers to such things as the frequency and scheduling of transportation, and to the selection of markets to or from which transportation is provided . . . ." (quoting *Charas*, 160 F.3d at 1265-66)).

Indeed, the Ninth Circuit explicitly refused to broaden its definition of "service" to include an airline's *policies* to provide the many services and amenities that help to distinguish one airline from another in the competitive marketplace. *See* Pet. App. 5a-6a. Such policies undeniably affect the airlines' ability to compete both domestically and abroad. *See* 49 Fed. Reg. 25408, 25412 (June 20, 1984) ("While no-smoking restrictions are important, the government should not impose restrictions on airlines that hamper their growth *or ability to compete*.") (emphasis added). In the Ninth Circuit, however, if an airline's policies conflict with the policies of any given state, that state's

laws and policies will control. That is flatly contrary to the intent of Congress in enacting the ADA's preemption provision. As this Court has explained, the ADA's preemption provision "is most sensibly read, in light of the ADA's overarching deregulatory purpose, to mean 'States may not seek to impose their own public policies or theories of competition or regulation on the operations of an air carrier.'" *Wolens*, 513 U.S. at 229 n.5 (quoting and adopting brief of United States as *amicus curiae*). But the ruling below endorses just such an imposition. At least where, as here, such a policy has been implemented to meet and hopefully surpass the competition, it should be immune from state regulation. *See id.* at 226 (holding that state fraud claim would affect the "service" of frequent flyer class upgrades); *Morales*, 504 U.S. at 378 (recognizing that ADA was designed to "'promote maximum reliance on competitive market forces'" (quoting 49 U.S.C. App. § 1302(a)(4)).[11]

In adopting its restrictive interpretation of the term "service," the Ninth Circuit also ignored the contemporaneous interpretation of that term by the Civil Aeronautics Board, which explicitly *included* services not directly related to fares or routes, such as "reservation and boarding practices, insurance, *smoking rules*, meal service, entertainment . . . minimum liability for loss, damages and delayed baggage, and ancillary charges for headsets, alcoholic beverages,

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[11]This must be contrasted with state personal injury suits alleging the *negligent rendition* of an airline's services by an errant employee. Such suits deter only the employee's negligent conduct. They would not regulate the airline by deterring it from having such a policy going forward and, therefore, would not be preempted under the ADA. *See, e.g., Hodges*, 44 F.3d at 339-40; *Woodson*, 67 F. Supp. 2d at 557 (tort claim not preempted where it would not force airline to alter a "practice," "procedure" or "service" related to boarding).

entertainment, and excess baggage." 44 Fed. Reg. 9948, 9951 (Feb. 14, 1979) (emphasis added). That administrative interpretation is entitled to judicial deference.

Perhaps most striking of all is the Ninth Circuit's refusal to allow preemption of any tort claim even if it would have the indirect effect of forcing the airline to alter the routes it chooses to fly. *See* Pet. App. 6a-7a. This unyielding interpretation is patently inconsistent with this Court's repeated emphasis that state enforcement actions are preempted even if their effect on an airline's rates, routes or services is *indirect*. *See Morales*, 504 U.S. at 386.

In sum, although the particular airline policy at issue in this tort case may have been foreclosed prospectively by new federal smoking regulations, *see supra*, p. 3 n.1 there remains an urgent need for action by this Court to clarify the law and rectify the approach adopted by the Ninth Circuit. This case, because it involves an airline policy not directly related to fares or routes but unquestionably related to airline competition, would be an excellent vehicle for addressing the multifaceted circuit conflict. A resolution would also be very timely, in view of the fact that the conflict has "matured" to the point where it is intractable and is causing real practical problems for national air carriers attempting to determine which state laws apply to them.

CONCLUSION

The writ of certiorari should be granted.

Respectfully submitted,

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September 13, 2000

APPENDIX

APPENDIX A

United States Court of Appeals,
Ninth Circuit.

Julie DUNCAN, on behalf of herself and all others similarly situated,

Plaintiff-Appellant,

v.

NORTHWEST AIRLINES, INC.,

Defendant-Appellee.

No. 98-35617.

Argued and Submitted Dec. 7, 1999

Filed April 6, 2000

Before: REAVLEY,[1] REINHARDT, and McKEOWN, Circuit Judges.

REINHARDT, Circuit Judge:

In this case, we must determine whether a class-action tort suit brought against Northwest Airlines by some of its flight attendants is preempted by the Airline Deregulation Act. We hold that it is not.

I. BACKGROUND

Julie Duncan, as the named plaintiff, filed a class-action, personal-injury lawsuit against Northwest Airlines in Washington state court. Brought on behalf of nonsmoking flight attendants who served as crew members on Northwest's smoking flights to and from Asia, the suit raises a claim based

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[1] The Honorable Thomas M. Reavley, Senior United States Circuit Judge for the United States Court of Appeals, Fifth Circuit, sitting by designation.

on Northwest's smoking policy. At the time the action was filed, Northwest prohibited smoking on all domestic and most international flights, but permitted smoking on most flights to and from Asia.[2] In her complaint, Duncan argued that, by permitting smoking on most trans-Pacific flights, Northwest breached its duty under state law to provide a safe and healthy work environment for its employees. She further alleged that Northwest's decision to allow smoking on these flights injured the flight attendants by exposing them to secondhand smoke. The complaint sought damages, an injunction, and medical monitoring.[3]

Northwest removed the suit to federal court and filed a motion to dismiss, asserting that Duncan's action was preempted by § 1305(a)(1) the Airline Deregulation Act (ADA). The district court granted Northwest's motion and dismissed the case. Duncan appealed. After the appeal was filed, Northwest banned smoking on all trans-Pacific flights.

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[2] Prior to 1988, nearly every airline permitted smoking on both domestic and international flights. Smoking policies began to change in 1988, when a federal statute banned smoking on some domestic flights. Since then, a combination of statutory prohibitions, international agreements, and voluntary efforts by airlines have made nonsmoking domestic and international flights the rule rather than the exception.

[3] Both Duncan and Northwest agree that Duncan abandoned her claim for injunctive relief before the district court. In any event, her request for injunctive relief would now be moot, given that Northwest no longer permits smoking on its trans-Pacific flights.

II. DISCUSSION

On appeal, we must determine whether Duncan's tort suit is preempted by § 1305(a)(1) of the ADA. Section 1305(a)(1) provides:

> [N]o state or political subdivision thereof and no interstate agency or other political agency of two or more states shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law *relating to the rates, routes or service* of any air carrier.... [4]

49 U.S.C. app. § 1305(a)(1) (emphasis added). The scope of preemption under this provision depends on the interpretation of the phrase "relating to the rates, routes or service."[5] When the district court dismissed Duncan's suit, the meaning of this phrase--and hence the scope of preemption under section 1305(a)(1)--was uncertain both in this circuit and others.

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[4] In 1994, section 1305(a)(1) of the ADA was amended and incorporated into the Federal Aviation Administration Authorization Act of 1994. *See* 49 U.S.C. § 41713(b)(1). As amended, the provision reads in relevant part: "[A] State, political subdivision of a State, or political authority of at least 2 States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier that may provide air transportation under this subpart." Because the minor amendments are nonsubstantive, for convenience we will continue to refer to the provision as § 1305(a)(1) of the ADA.

[5] Obviously, an action is preempted only if it also satisfies the other requirements of § 1305(a)(1). For purposes of the present appeal, we assume that a court ruling that granted relief in Duncan's suit would constitute the enforcement by Washington of "a law, regulation, or other provision having the force and effect of law." 49 U.S.C. app. § 1305(a)(1).

While Duncan's appeal was pending, we substantially clarified the scope of § 1305(a)(1) preemption in *Charas v. Trans World Airlines, Inc.*, 160 F.3d 1259 (9th Cir. 1998) (en banc).[6] In that case, we provided a definitive interpretation of the term "service": we concluded that "Congress used the word 'service' in the phrase 'rates, routes, or service' in the ADA's preemption clause to refer to the prices, schedules, origins and destinations of the point-to-point transportation of passengers, cargo, or mail."[7] *Id.* at 1261. This interpretation was mandated by the purpose and language of the preemption provision. First, we determined that "in enacting the ADA, Congress intended to preempt only state laws and lawsuits that would adversely affect the economic deregulation of the airlines and the forces of competition within the airline industry. Congress did not intend to preempt passengers' run-of-the-mill personal injury claims."[8] *Id.* Accordingly, we interpreted the term

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[6] For a detailed description of the evolution of ADA preemption doctrine in this circuit, see *Charas*, 160 F.3d at 1262-63.

[7] We also expressly overruled our earlier decisions in *Harris v. American Airlines, Inc.*, 55 F.3d 1472 (9th Cir. 1995), and *Gee v. Southwest Airlines*, 110 F.3d 1400 (9th Cir. 1997), to the extent that those decisions were inconsistent with our new decision.

[8] One might argue that, because the quoted passage mentions only *passengers'* personal injury claims, *Charas* is inapplicable to personal injury claims brought by others, such as flight attendants. However, we stated that *passengers'* claims were not preempted because the claims before us were all filed by passengers. The logic of *Charas* does not support a distinction between passenger plaintiffs and other plaintiffs. The opinion turns on the effect of a lawsuit on certain aspects of the defendant airlines' business, not on the role of the plaintiff who brought the lawsuit. Moreover, any such argument is rebutted by the fact that, in its conclusion, *Charas* holds that "[Congress] did not intend to immunize the airlines from liability for personal injuries caused by their tortious conduct." 160 F.3d at 1266. Nothing in this statement suggests that we intended the holding in *Charas* to be limited to suits brought by passengers.

"service" narrowly in order to prevent the "preemption of virtually everything an airline does." *Id.* at 1266. Second, our interpretation of the term "service" was guided by the context in which the term was used:

> Airlines' "rates" and "routes" generally refer to the point-to-point transport of passengers. "Rates" indicates price; "routes" refers to courses of travel. It therefore follows that "service," when juxtaposed to "rates" and "routes," refers to such things as the frequency and scheduling of transportation, and to the selection of markets to or from which transportation is provided....
>
> ....
>
> [Thus,] [l]ike "rates" and "routes," Congress used "service" in § 1305(a)(1) in the public utility sense--i.e., [to refer to] the provision of air transportation to and from various markets at various times.

Id. at 1265-66. We concluded that, "[i]n the context in which it was used in the Act, 'service' was not intended to include an airline's provision of in-flight beverages, personal assistance to passengers, the handling of luggage, and similar amenities." *Id.* at 1261.

Given our holding in *Charas*, it is clear that allowing smoking on Northwest's trans-Pacific flights does not constitute a "service." An airline's decision to permit (or not to permit) smoking on a flight is not a decision dealing with "the frequency and scheduling of transportation, [or] the selection of markets to or from which transportation is provided." *Charas*, 160 F.3d at 1265-66. Rather, like the

decision to offer in-flight beverages, a rule permitting or prohibiting smoking deals with what we termed, for want of a better word, "amenities." Northwest contends that, even if permitting smoking does not itself constitute a service, Duncan's action is still preempted by § 1305(a)(1) because it "relates to" a "service." The airline's argument proceeds in two parts. First, it contends that the result of permitting Duncan's lawsuit to proceed might be to force Northwest to prohibit smoking on any trans-Pacific flights that originate in Washington State. It argues that this forced prohibition, in turn, might compel Northwest, for economic reasons, to drop its trans-Pacific departures from Washington and reroute its other trans-Pacific flights around the state. The airline argues that this causal relationship between Duncan's tort suit and its provision of "services" renders her claim "related to" a "service."

Northwest's argument about the causal connection between its smoking policy and its ability to profit on the trans-Pacific routes is unpersuasive. As noted above, Northwest stopped allowing smoking on its trans-Pacific flights while Duncan's appeal was pending. In spite of its smoking prohibition, Northwest has not canceled its trans-Pacific flights. Thus, the airline's own business decision demonstrates conclusively that, even if Duncan's suit had forced it to prohibit smoking on flights originating in Washington (and perhaps it did), the airline would not have had to cancel its Washington-based trans-Pacific departures and reroute its other flights.

Moreover, the type of causal relationship to a "service" alleged by Northwest is not sufficient to invoke preemption under § 1305(a)(1). If it were, then, contrary to *Charas*, almost all personal injury claims would be preempted. This is because

all successful tort suits--and certainly all successful class-action tort suits--invariably carry with them an economic cost for the defendant airline. Such cases may even, in some instances, cause the airline to decide to make changes in its operations. *Charas* makes clear, however, that the imposition of liability as a result of a personal injury action does not sufficiently interfere with the objectives of airline deregulation to warrant preemption of the action--in other words, the connection between an award in a tort case and an airline's "services" is simply too tenuous. *See* 160 F.3d at 1261, 1266; *see also Newman v. American Airlines*, 176 F.3d 1128, 1131 (9th Cir. 1999). *Cf. Morales v. Trans World Airlines*, 504 U.S. 374, 378, 112 S. Ct. 2031, 119 L. Ed.2d 157 (1992) (holding that state actions are not preempted if they affect rates, routes, or services "in too tenuous, remote, or peripheral a manner" (internal quotation omitted)).

Finally, Northwest argues that *Read-Rite Corp. v. Burlington Air Express*, 186 F.3d 1190 (9th Cir.1999), somehow compels a different result. *Read-Rite*, however, provides no support for Northwest's position. *Read- Rite* concerned the law governing the loss of or damage to goods transported by interstate common carriers. In that case, we held that "state law regulating the scope of air carrier liability for loss or damage to cargo is preempted by the ADA." *Id.* at 1197. The crux of our holding was that claims arising from damage by common carriers had been governed by a purely federal regime for nearly the entire century. We described that regime as follows: "federal regulation by statute, federal preemption of state regulation, and regulation by federal common law of matters not covered by federal statute." *Id.* at 1196. Unlike personal injury claims, which *state tort law* has traditionally governed, *federal law* governed the claims at issue in *Read-Rite* prior to the enactment of the ADA. Consequently, *Read-Rite*'s

finding of preemption after the ADA's enactment simply maintained the regulatory status quo ante. Because it did not address the question of when preemption within a field that the states have traditionally occupied is appropriate--the question at issue in both *Charas* and the present case--*Read-Rite* is of no relevance here.

III. CONCLUSION

For the foregoing reasons, we reverse the district court's conclusion that Duncan's suit is preempted by § 1305(a)(1) of the ADA, hold that the provision does not preempt Duncan's action, and remand for further proceedings consistent with this opinion.

REVERSED and REMANDED.

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JULIE DUNCAN, on behalf of herself and all others similarly situated, Plaintiff, vs. NORTHWEST AIRLINES, INC., Defendant.	No. C98-130Z ORDER Filed June 5, 1998

Julie Duncan, a flight attendant for Northwest, alleges negligence under Washington state law based on Northwest's policy permitting smoking on its Transpacific flights. Duncan seeks: 1) to enjoin passengers from continuing to smoke on those flights; 2) to recover damages resulting from exposure to secondhand smoke on those flights; and 3) to establish a fund for medical monitoring flight attendants who worked the Asia flights. Northwest Airlines moves to dismiss Duncan's complaint on grounds that it is preempted by the Airline Deregulation Act ("ADA"), 49 U.S.C. § 41713 (b) (1994). The Court grants Northwest's motion.

I. DISCUSSION

Although it has banned smoking at its corporate headquarters and on its domestic and trans-Atlantic flights, Northwest Airlines continues to allow smoking in designated

areas on most of its flights to and from Asia and within Asia. Julie Duncan is a flight attendant for Northwest and has worked on the Asian flights where smoking is allowed. Ms. Duncan, on behalf of herself and all similarly situated flight attendants, claims that Northwest owes a duty to its employees to provide a safe work environment, including an environment free of harmful tobacco smoke and that Northwest's refusal to ban smoking is a breach of this common law duty. Northwest argues that Duncan's claim under Washington law is preempted by § 105 of the Airline Deregulation Act.

Section 105 of the ADA provides that:

> [A] State, political subdivision of a State, or political authority of at least 2 States may not enact or enforce a law, regulation, or other provision having the force and effect of law, related to a price, route, or service of an air carrier that may provide air transportation under this subpart.

49 U.S.C. § 41713 (b)(1) (1994).

There are two questions at the heart of whether § 105 preempts Duncan's state law claims. The first question is whether application of the state's common law of negligence constitutes the enactment or enforcement of "a law, regulation, or other provision having the force and effect of law." 49 U.S.C. § 41713 (b)(1). The second question is whether the claim "relates to rates, routes or service" or merely involves the regulation of operation or maintenance of the aircraft. Ninth Circuit precedent makes clear that assertions of preemption rise or fall upon these determinations and both Duncan and Northwest acknowledge that these are fundamental in determining the pending motion.

A. Enforcement or Enactment of a Law, Regulation or Provision Having the Force of Law

The Supreme Court has recognized that the preemptive scope of § 105 extends well beyond state statutes directly targeted at the airline industry. *See American Airlines v. Wolens*, 513 U.S. 219, 222-23 (1995). In *Wolens*, the Court held that, although plaintiffs' cause of action for breach of contract was not preempted by § 105, a claim under Illinois's generally applicable Consumer Fraud Act was preempted. According to Duncan, *Wolens*, proves that Congress "did not intend to occupy the field of airplane safety to the exclusion of state common law." *Cleveland v. Piper Aircraft Corp.*, 985 F.2d 1438, 1442 (10th Cir. 1993). But the Supreme Court's reason for allowing the breach of contract suit to go forward under state law does not support allowing Duncan's negligence suit to go forward. The Supreme Court was careful to note the "distinction between what the State dictates [by way of substantive tort standards, for example] and what the airline itself undertakes" through the terms of its contract. *Wolens*, 513 U.S. at 233. The Court then reasoned that the very terms of the contract "confine[] the courts, in breach of contract actions, to the parties' bargain, with no enlargement or enhancement based on state laws or policies external to the agreement." *Id.*

Likewise, Washington state's common law duty to provide employees with a sufficiently smoke-free work environment, *McCarthy v. Dept. of Social & Health Servs.*, 110 Wn. 2d 812 (1988), does more than "simply give effect to bargains offered by the airlines and accepted by airline customers." *Wolens*, 513 U.S. at 233. It would impose a state-created affirmative duty upon Northwest to alter its own smoking policies on its

international flights. Such a state-imposed duty interferes with the purpose behind ADA preemption, which is to "encourage, develop, and attain an air transportation system which relies on competitive market forces to determine the quality, variety and prices of air services." H.R. Cong. Rep. No. 95-1779, 95th Cong. (1978); *see* ADA, 49 U.S.C. § 1302(a)(4), (a)(9) (1990).

The Ninth Circuit has recognized that claims founded on state common law of negligence fall within the preemptive scope of the ADA. *See Gee v. Southwest Airlines*, 110 F.3d 1400, 1404 (9th Cir. 1997); *Harris v. American Airlines*, 55 F.3d 1472, 1476 (9th Cir. 1995). Although it was not discussed expressly, the Ninth Circuit in *Gee* and *Harris* necessarily concluded that to hold an airline liable under state common law of negligence would be to "enforce a law, regulation, or other provision having the force and effect of law" when it held certain negligence claims to be preempted. *See Gee*, 110 F.3d at 1404; *Harris*, 55 F.3d at 1476. Duncan's claim for negligence under Washington state law, therefore, is exactly the type of action that triggers § 105's preemption.

B. "Service" or Operation and Maintenance

The more difficult inquiry is whether Northwest's smoking policy constitutes a competitive "service" for the purpose of § 105 preemption. The Ninth Circuit has found a relatively broad range of common law tort claims to be sufficiently linked to an airline's services so as to preempt the claims. *See Gee*, 110 F.3d at 1404 (negligence claim based on providing passengers with too many drinks and failing to provide assistance to disabled passenger are preempted); *Harris*, 55 F.3d at 1476-77 (negligence claim based on failure to control unruly passenger preempted).

In *Harris*, the Ninth Circuit held a woman's state law negligence claim based upon a flight attendants continuing to serve an intoxicated passenger who was harassing her was preempted by the ADA. The court concluded that Harris' claims "pertain[ed] directly to a 'service' the airlines render; the provision of drink." *Id.* at 1476. The Ninth Circuit relied in large part upon the Supreme Court's expansive reading of the ADA's preemptive power in *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992). In *Morales*, the Supreme Court held that the preemptive scope of the ADA's "relating to rates, routes, or service" language to the preemptive provision in ERISA, 29 U.S.C. § 1144(a), which preempts all state laws "insofar as they . . . relate to any employee benefit plan." *Id.* at 383. Having found such a broad preemptive purpose, the Court held that any "State enforcement actions having a connection with or reference to airline 'rates, routes, or services' are preempted." *Id.* Although *Harris* remains intact, the Ninth Circuit has since backed away from such a broad interpretation of the ADA's preemptive scope. *See Gee*, 110 F.3d at 1404-05. In *Gee*, the Ninth Circuit held that claims of emotional distress based on a flight attendant's failure to stop serving alcohol to an intoxicated passenger and claims arising out of a flight attendant's failure to assist a disabled passenger were sufficiently related to service to be preempted under the ADA. *Id.* at 1406. Claims arising from an injury suffered when a flight attendant failed to secure the latch on a drink cart's door, however, were found to be related to the operation or maintenance of the plane rather than to services and were not preempted. *Id.* at 1407. Likewise, a claim for injuries suffered when an item fell from the overhead bin were not sufficiently related to services to be preempted. *Id.*

Gee recognized the importance of considering the ADA's goals of airline deregulation as they relate to specific claims in

determining the scope of preemption. *Id.* at 1404 (citing *West v. Northwest Airlines, Inc.*, 995 F.2d 148 (9th Cir. 1993). The court in *Gee* recognized that post-*Harris* decisions of the Supreme Court had indicated both that the scope of preemption under the ADA's "relates to rates, routes, and service" language may not be so broad. *Id.* at 1405 (citing *New York State Conf. of Blue Cross & Blue Shield v. Travelers Ins. Co.*, 514 U.S. 645 (1995)).

In *Travelers*, the Supreme Court adopted an approach to preemption contrary to what the Ninth Circuit did in *Harris* and contrary to the approach that it had previously taken in *Morales*. *Travelers*, 514 U.S. at 657. The *Travelers* Court explained that the preemption analysis must start from the "assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear manifest purpose of Congress." *Id.* at 655. Such a presumption against preemption runs contrary to *Harris*, where the Ninth Circuit established a presumption that all claims related to services were preempted, from which the court would later carve exceptions such as breach of contract claims. *See Harris*, 55 F.3d at 1477. Moreover, to the extent that *Harris* relied upon *Morales*' broad, ERISA-based interpretation of the scope of preemption, *Travelers* altered the yardstick of preemption in the ERISA context. The Supreme Court noted that if the phrase "relate to" is extended to "its furthest reach of indeterminacy, then for all practical purposes preemption would never run its course." *Travelers*, 514 U.S. at 655.

The Supreme Court's "backtracking" from *Morales* and the Ninth Circuit's subsequent criticism of its own reasoning in *Harris* does not alter the result in this case. This court need not rely upon *Harris* to its fullest extent in finding that Duncan's claims are preempted. Northwest's smoking policy does not

relate to a service in an indeterminate way. The Civil Aeronautics Board, when implementing the ADA's preemption provision, recognized expressly that smoking policies were within the preemptive scope of § 105.44 Fed. Reg. 9948, 9951 (1979). The Board explained that § 105 precludes states from interfering "with the services that carriers offer in exchange for their rates and fares. For example, liquidated damages for bumping (denial of boarding), segregation of smoking passengers, minimum liability for loss, . . . alcoholic beverages, entertainment, and excess baggage would clearly be 'service' regulation within the meaning of section 105." 44 Fed. Reg. 9948, 9951 (1979). The Board provided even more directly implicated claims such as Duncan's in its conclusion of what is preempted by § 105: "Accordingly, we conclude that preemption extends to all of the economic factors that go into the provision of the quid pro quo for passenger's fare, including . . . smoking-rules." *Id.* Likewise, in *Diefenthal v. Civil Aeronautics Board*, 68 F.2d 1039, the court held that the regulation of smoking was authorized under the Airline Deregulation Act as related to the kind or quality of service which a carrier provides. *Id.* at 1044.

The Civil Aeronautics Board regulations and the Ninth Circuit's holdings in *Harris* and *Gee* indicate that Northwest Airlines' policy of allowing smoking on its trans-Pacific routes is a function of its service for the purposes of § 105 of the ADA. Although Washington state has an interest in assuring safety in Ms. Duncan's workplace, the ADA makes clear that this interest must yield to the federal interest in "encourag[ing], develop[ing], and attain[ing] an air transportation system which relies on competitive market forces to determine the quality, variety, and prices of air services." H.R. Cong. Rep. No. 95-1779, 95th Cong. (1978). Providing customers with the option to smoke in designated areas of the plane is regrettably a part

of the "quid pro quo" for some passengers' fare. 44 Fed. Reg. at 9951. And to the extent that Northwest must maintain smoking sections on its Trans-Pacific flights in order to compete with Asian carriers, this service is one of the competitive market forces" upon which Northwest relies.

Duncan attempts to escape preemption by characterizing the cause of her injuries as "Northwest's failure to properly operate and maintain the aircraft by allowing the cabin to fill with toxic fumes." Duncan claims that, as in *Gee*, the "claim does not relate to airline 'service' but rather is connected with the failure to take appropriate safety measures relating to the operation of the aircraft" *Gee*, 110 F.3d at 1407. However, Duncan does not point to any instrumentality or mechanical element of the airplane that malfunctioned or was improperly operated by the crew. In *Gee*, the claims that were not preempted all involved the crew's improper *operation* of the aircraft. Those claims that were part of the bargained-for service provided to passengers were not preempted. Because Northwest's smoking policies are part of the competitive package that the airline offers in its quid pro quo with passengers, claims arising from those policies are preempted.

The Fifth Circuit cases of *Smith v. America West Airlines. Inc.*, 44 F.3d 344, 346-47 (5th Cir. 1995) and *Hodges v. Delta Airlines. Inc.*, 44 F.3d 334, 338 (5th Cir. 1995) are harmonious with Ninth Circuit distinction between service and operations and maintenance, and do not require a different result *Gee*, 110 F.3d at 1407. In *Smith*, the court was confronted with a state law personal injury claim based on the airline's permitting a visibly deranged man to board the plane. The court relied heavily upon the purpose of the Airline Deregulation Act in determining the scope of preemption. The court noted that § 150 "assured the economic deregulation of the airlines by

rendering them immune from rate and service regulation by the states after the demise of federal regulation. Neither the language nor history of the ADA implies that Congress was attempting to displace state personal injury tort law concerning the safety of the airline business." The court concluded that, if they had ultimately recovered, the Smiths' claim "could affect the airline's ticket-selling, training or security procedures, but it would not regulate the economic or contractual aspects of boarding [the plane]. Any such effect would be 'too tenuous, remote or peripheral' to be preempted by §1305(a)(1)." *Smith*, 44 F.3d at 347 (quoting *Shaw v. Delta Air Lines. Inc.*, 463 U.S. 85, 100 n. 21(1983)). The court in *Smith* did preempt claims for the negligent rendition of service by an air carrier. *Id.* After noting that the real question is the scope of services that §105 was intended to reach, the court concluded that "those services include boarding practices and their economic and contractual dimension but not insofar as the safety of the flight is involved." *Id.*

In conclusion, the Court concludes that the Northwest smoking ban relates to services that require preemption under the Airline Deregulations Act. Accordingly, the Court GRANTS the motion to dismiss and directs the Clerk to enter final judgment pursuant to this Order.

IT IS SO ORDERED.

DATED this 5th day of June, 1998.

THOMAS S. ZILLY
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
Western District of Washington

JUDGEMENT IN A CIVIL CASE

JULIE DUNCAN

v. CASE NUMBER C98-130Z

NORTHWEST AIRLINES, INC.

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED THAT

The Court GRANTS the defense motion to dismiss.

Judgment is hereby entered in favor of the defendant with costs and with prejudice.

BRUCE RIFKIN, Clerk
By /s/Casey Condon
Casey Condon
Deputy Clerk

June 11, 1998
Date

APPENDIX C

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JULIE DUNCAN, on behalf of herself and all others similarly situated, Plaintiff-Appellant, v. NORTHWEST AIRLINES, INC., Defendant-Appellee.	No. 98-35617 D.C. No. CV-98-00130-TSZ ORDER Filed June 16, 2000

Before: REAVLEY,[1] REINHARDT, McKEOWN,
Circuit Judges

The panel has voted to deny the petition for rehearing. Judges Reinhardt and McKeown voted to deny the petition for rehearing en banc, and Judge Reavley so recommended.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing and the petition for rehearing en banc are denied.

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[1] The Honorable Thomas M. Reavley, Senior United States Circuit Judge for the United States Court of Appeals, Fifth Circuit, sitting by designation.

APPENDIX D

FROM TITLE 49. TRANSPORTATION
SUBTITLE VII--AVIATION PROGRAMS
PART A--AIR COMMERCE AND SAFETY
SUBPART II--ECONOMIC REGULATION
CHAPTER 417--OPERATIONS OF CARRIERS
SUBCHAPTER I--REQUIREMENTS

§ 41713. Preemption of authority over prices, routes, and service

(a) Definition.--In this section, "State" means a State, the District of Columbia, and a territory or possession of the United States.

(b) Preemption.--(1) Except as provided in this subsection, a State, political subdivision of a State, or political authority of at least 2 States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier that may provide air transportation under this subpart.

(2) Paragraphs (1) and (4) of this subsection do not apply to air transportation provided entirely in Alaska unless the transportation is air transportation (except charter air transportation) provided under a certificate issued under section 41102 of this title.

(3) This subsection does not limit a State, political subdivision of a State, or political authority of at least 2 States that owns or operates an airport served by an air carrier holding a certificate issued by the Secretary of Transportation from carrying out its proprietary powers and rights.

(4) Transportation by air carrier or carrier affiliated with a direct air carrier.--

(A) General rule.--Except as provided in subparagraph (B), a State, political subdivision of a State, or political authority of 2 or more States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier or carrier affiliated with a direct air carrier through common controlling ownership when such carrier is transporting property by aircraft or by motor vehicle (whether or not such property has had or will have a prior or subsequent air movement).

(B) Matters not covered.--Subparagraph (A)--

(i) shall not restrict the safety regulatory authority of a State with respect to motor vehicles, the authority of a State to impose highway route controls or limitations based on the size or weight of the motor vehicle or the hazardous nature of the cargo, or the authority of a State to regulate motor carriers with regard to minimum amounts of financial responsibility relating to insurance requirements and self-insurance authorization; and

(ii) does not apply to the transportation of household goods, as defined in section 13102 of this title.

(C) Applicability of paragraph (1).--This paragraph shall not limit the applicability of paragraph (1).

APPENDIX E

SUPERIOR COURT OF WASHINGTON IN AND FOR KING COUNTY

JULIE DUNCAN, on behalf of herself and all others similarly situated, Plaintiff, v. NORTHWEST AIRLINES, INC., Defendant.	No. 98-2-01158-1SEA Class Action Complaint for Injunctive Relief, Medical Monitoring and Damages

Plaintiff Julie Duncan alleges, upon personal knowledge and belief as to her own act and upon information and belief based on investigation of counsel as to all other matters, as follows:

* * * *

4. Northwest's reason for allowing smoking, especially on flights to and from Japan, is its profit motivation. Northwest's decision is based on feedback from key corporate accounts who have indicated that allowing smoking on certain routes is essential to retaining their business.

* * * *

35. Northwest's reason for maintaining "smoking" flights especially between the United States and Japan is a result of a corporate decision to favor the desire to key corporate

accounts over the health of its employees. In other words, profit is more important than the health of Northwest's flight crew members, who are continually subjected to smoke-filled cabins on long flights over the Pacific.

* * * *

Supreme Court, U.S.
FILED
OCT 16 2000
OFFICE OF THE CLERK

(2)

No. 00 - 404

IN THE

Supreme Court of the United States

NORTHWEST AIRLINES, INC.,

Petitioner,

v.

JULIE DUNCAN, on behalf of herself and all others similarly situated,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

RESPONDENT'S BRIEF IN OPPOSITION

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34 pp

QUESTION PRESENTED

Section 105(a)(1) of the Airline Deregulation Act preempts state laws and regulations "related to a price, route or service of an air carrier." 49 U.S.C. § 41 713(b)(1). The question presented is whether the Court should except review of a Ninth Circuit unanimous opinion, which held consistent with opinions of this Court and the circuit and district courts to address the issue, that absent an express indication of preemption, respondent's claim for personal injuries incurred in her work as a flight attendant was not preempted. Stated alternatively, whether there is conflict in a decision holding in harmony with the Fifth Circuit and other district courts addressing the issue, that a tort award in a personal physical injury action relates too tenuously to any "service" of an airline to warrant preemption.

RULE 29.6 STATEMENT

Pursuant to Sup. Ct. Rule 29.6, respondent hereby states that she is an individual and thus has no corporate parents or subsidiaries.

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ADDITIONAL STATUTORY PROVISION INVOLVED

In addition to the provision identified by petitioner, another statutory provision involved is 49 U.S.C. § 41112 (amending 49 U.S.C. § 1371 (1978)). This provision states in pertinent part:

> Liability Insurance. The Secretary of Transportation may issue a certificate to a citizen of the United States to provide air transportation as an air carrier under section 41102 of this title only if the citizen complies with regulations and orders of the Secretary governing the filing of an insurance policy or self-insurance plan approved by the Secretary. The policy or plan must be sufficient to pay, not more than the amount of the insurance, for bodily injury to, or death of, an individual or for loss of, or damage to, property of others, resulting from the operation or maintenance of the aircraft under the certificate. A certificate does not remain in effect unless the carrier complies with this subsection.

STATEMENT OF THE CASE

A. Northwest's Failure To Provide a Safe and Hazard-Free Work Environment

At the time this case was filed, every other U.S. airline had banned smoking on both North American and international flights with the exception of Northwest. Rather, Northwest continued to allow smoking on most flights to and from Asia as well as flights within Asia. Northwest allowed toxic fumes to bellow through the stale air on its planes despite banning smoking at its own corporate headquarters to protect the "health of [its] people." To Northwest, it was simply a business decision. To maintain profits in its Asia-market, Northwest callously decided to expose its workers to unsafe working conditions that it would not permit at corporate headquarters, by requiring that flight attendants work for long hours in smoke-filled international flights.

As set forth in the complaint, it was not unusual for Plaintiff-Respondent, Julie Duncan, a Northwest flight attendant, "to have a runny nose, watery eyes, irritation of mucus membranes, and breathing discomfort within the first 30 minutes of take-off." Indeed, a "thick blue haze usually hangs over the smoking areas. [Ms.] Duncan often finds herself unconsciously holding her breath as she serves drinks and meals to smokers." After flying, Ms. Duncan continues "to battle sinus, bronchial and inner ear infections which sometimes last weeks." Ms. Duncan is informed and believes that "some flight attendants on smoking flights suffer from severe physiological ailments such as asthma, allergies, and chronic pulmonary conditions." Ms. Duncan

herself "has been diagnosed with limited pulmonary function and other chronic infections."

In her complaint, Ms. Duncan seeks compensation for the physical injuries suffered from the inhalation of toxic fumes in the work place. In addition, she requests that a medical monitoring fund be set up to deal with employee physical injuries derived from the inhalation of toxic fumes.

B. Course of Proceedings Below

Ms. Duncan filed her complaint on January 13, 1998 in Washington Superior Court In and For King County. On February 2, 1998, the case was removed to United States District Court for the Western District of Washington at Seattle.

Shortly thereafter on March 2, 1998, Northwest Airlines filed a motion to dismiss asserting that Ms. Duncan's entire claim was preempted by the Airline Deregulation Act ("ADA"), now codified at 49 U.S.C. § 41713(b)(1). *See* Pet. App. 20a.

Simply put, Northwest asserted that smoking was a "service" and, in as much as Ms. Duncan's injuries were derived from the service of smoking – they were preempted. In her opposition, Ms. Duncan defended her complaint on two grounds – either capable of defeating Northwest's motion to dismiss. First, Ms. Duncan pointed out that relevant case law suggests that a personal injury lawsuit *is not* the equivalent of "a law, regulation, or other provision having the force and effect of law." Second, Ms. Duncan's injuries do *not* derive from a "service" Northwest chooses to offer.

In analyzing the motion to dismiss, the district court found "two questions at the heart of whether § 105 preempts Duncan's state law claims." Pet. App. 10a. First, whether a personal injury action triggers the application of the preemption provisions. Second, whether smoking is in fact a service sufficient to warrant preemption. *Id.* Erroneously, the district court answered both questions in Northwest's favor.

Ms. Duncan immediately appealed to the Ninth Circuit and during the pendency of the appeal, the Ninth Circuit issued its *en banc* decision in *Charas v. Trans World Airlines, Inc.*, 160 F.3d 1259 (9th Cir. 1998), *amended*, 169 F.3d 594 (9th Cir. 1999). The *Charas* case involved five personal injury cases consolidated for appeal. In *Charas*, the court held that personal injury claims relating to fallen luggage, spilled drinks, failures to meet and assist and the like were not "related to" a "service" within the context of ADA preemption. 160 F.3d at 1266. More importantly, the *Charas* court determined that "when Congress enacted federal economic deregulation of the airlines, it intended to insulate the industry from possible state economic regulation as well. It intended to encourage the forces of competition. It did not intend to immunize the airlines from liability for personal injuries caused by their tortious conduct." *Id.*

The *Charas* court began its analysis by focusing on Supreme Court precedent, *American Airlines v. Wolens*, 513 U.S. 219, 230 (1995) and *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 390 (1992), as well as prior Ninth Circuit opinions. The court next turned directly to the statute, finding that "[n]othing in the Act itself, or its legislative history, indicates that Congress had a 'clear and

manifest purpose' to displace state tort law in actions that do not affect deregulation in more than a 'peripheral manner.'" *Id.* at 1265 (citing *Morales*, 504 U.S. at 390). Moreover, two provisions of the Act – the requirement that airlines carry insurance and the savings clause – suggested to the court that tort claims for physical injury were not contemplated within the preemptive scope. 160 F.3d at 1264.

Additionally, the *Charas* court, being "mindful that principles of statutory construction require us to consider the term within its context," *id.* at 1265 (citing *Pension Benefit Guar. Corp. v. Carter & Tillery Enters.*, 133 F.3d 1183, 1186 (9th Cir. 1998)), set forth a definition of "services" that made sense given its position next to the terms "rates" and "routes." The court defined the term "services" as referring "to such things as the frequency and scheduling of transportation, and to the selection of markets to or from which transportation is provided." *Charas*, 160 F.3d at 1265-66.

Though Northwest suggests the contrary, this definition of "service" was not the court's sole rationale for determining that the five consolidated cases before it were not preempted. Rather, simply stated, *Charas* found that claims like Ms. Duncan's, did not affect the purpose and intent of the ADA, i.e., economic deregulation of airlines. 160 F.3d at 1265 (citing *Wolens*, 513 U.S. at 230; *Morales*, 504 U.S. at 390). As *Charas* held, the "purpose of preemption is to avoid state interference with federal deregulation. Nothing in the Act itself, or its legislative history, indicates that Congress had a 'clear and manifest purpose' to displace state tort law in actions that do not affect deregulation in more than a 'peripheral manner.'" *Id.* (quoting *Morales*, 504 U.S. at 390)).

With the *Charas* opinion in mind, the Ninth Circuit panel in this case held that Ms. Duncan's personal physical injury claims were not preempted. The panel determined, like *Charas*, that permitting passengers to smoke on flights, like permitting passengers to drink in-flight beverages, deals with "amenities" an airline offers and not with a particular service. Pet. App. 6a. However, also like *Charas* this definition of "service" was simply not the sole basis of the panel's finding. Indeed, as the panel specifically stated, even if smoking were a service, "the connection between an award in a tort case and an airline's 'service' is simply too tenuous." Pet. App. 6a-7a.

REASON FOR DENYING THE PETITION

This case presents no question of fundamental importance as the Ninth Circuit in this case, like the Fifth Circuit and district courts presented with the same or similar facts, has determined that section 105(a)(1) of the ADA, which preempts any state "law, regulation, or other provision having the force and effect of law related to a price rate route, or service of an air carrier," 49 U.S.C. § 41713(b)(1), does not preempt personal physical injury claims. While there has been a disagreement among the Fifth and Ninth Circuits as to the proper definition of the word "service" in the ADA, there has been harmony among the courts as to the intent of the ADA. This harmony produces a consistent result despite the differing definitions of the term "service." Simply put, while the Fifth and the Ninth Circuits have defined "service" in different ways, both circuits have found that regardless of the definition, a tort award in a case involving personal physical injury is simply too tenuously related to any "service." *Hodges v.*

Delta Airlines, 44 F.3d 334, 339 (5th Cir. 1995) ("[E]nforcement of tort remedies for, personal physical injury ordinarily has no 'express reference' to services as defined above.")); *Charas v. Trans World Airlines, Inc.*, 160 F.3d 1259, 1265 (9th Cir. 1998) ("Nothing in the Act itself, or its legislative history, indicates that Congress had a 'clear and manifest purpose' to displace state tort law in actions that do not affect deregulation in more than a 'peripheral manner.'"); *Duncan v. Northwest Airlines, Inc.*, No. 98-35617 (9th Cir. Apr. 6, 2000) ("the connection between an award in a tort case and an airline's "services" is simply too tenuous") (Pet. App. 7a).

In light of the harmony among the courts on the issue of personal physical injury claims under the ADA, Northwest's concern about the Ninth Circuit's "narrow interpretation of the ADA preemption provision" frustrating the goals of Congress is simply not ripe for review. Pet. 7. The issue in this case is whether a personal physical injury claim is "related to" a "service." Courts across the country have found that personal physical injury claims are not so related. As a result, to date, there have been no inconsistent rulings on this issue.

Most troubling, Northwest asserts that the "effect" of the Ninth Circuit's definition of "services" causes a disservice to the congressional goal to promote competition. This is because, according to Northwest, in the Ninth Circuit, state regulation of matters not directly involving prices or routes may proceed unfettered while, in several other circuits, "it is well established that such state law causes of action would be preempted." Pet. 8 (citing *Hodges*). But it is not so well established with respect to physical injury claims and Northwest must know that fact. Indeed, Northwest's Petition cites to nineteen cases only

three of which involve personal physical injury. *See Abdullah v. American Airlines, Inc.*, 181 F.3d 363, 367 (3d Cir. 1999) (Pet. 16, n.6); *Charas*, 160 F.3d 1259; *Hodges*, 44 F.3d 334. Notably, in all three cases, the physical injury claims were not preempted by the ADA. Hence, Northwest is not even able to cite to a decision in its entire Petition that renders a result different from that in the court below.

Contrary to Northwest's fears, the differing definitions of the term "service" will not subject the airline to patchwork regulation or require an airline to change its conduct from terminal to terminal. Pet. 8. Indeed, prior to a recent federal regulation that prohibits smoking on flights, Northwest itself choose to ban smoking. And its own business decision demonstrates that avoiding liability inducing conduct is possible without changing conduct from terminal to terminal. Hence, the threat of a tort award does not mean that the airline must change its behavior from place to place. It simply means that if its behavior produces a physical injury – it will be held to the same standard as any tortfeasor. Thus, contrary to the central theme of Northwest's petition, the airline industry and its ability to compete, is simply not being jeopardized by a lawsuit of this kind.

The core issue in this case is whether a lawsuit seeking damages for physical injury may proceed against an airline based on the airlines alleged wrongful conduct. The Ninth Circuit in this case and *Charas* correctly decided that Congress never intended to immune airlines from tort liability stemming from personal injuries. The Fifth Circuit in *Hodges* held the same. Northwest has not, because it cannot, point to a single circuit court opinion that held that a similar personal physical injury claim should be preempted under the ADA. Similarly, Northwest has not,

because it cannot, point to a single circuit court opinion finding that allowance of such a claim runs afoul of the goals of airline deregulation. On the issue of personal physical injury claims, the circuits are in harmony. As a result, review of the approach adopted by the Ninth Circuit in this case is neither "pressing" nor "urgent" as Northwest suggests. Simply put, holding airlines accountable for negligent and/or intentional conduct, which results in physical injury to passengers and crew, is not economic regulation. And all circuits, like the Ninth Circuit, agree. Rather than giving "carte blanche" to states to regulate how an airline competes, the decision of the Ninth Circuit simply requires Northwest to compensate its employees for failing to provide a safe and hazard-free work environment, a requirement imposed on all corporate America. There is nothing novel or urgent arising from the imposition of due care.

I. THERE IS NO CONFLICT AMONG THE CIRCUITS THAT WARRANTS REVIEW

A. The Purpose of the ADA is to Encourage Competition Not Shield Airlines From Liability for the Physical Injury They Cause

The ADA unwound much of the Federal Aviation Act of 1958,[1] which reserved broad powers to the federal government to regulate interstate airfares and promulgate

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[1] In 1994, the ADA, originally located at 49 U.S.C. § 1301, *et seq.*, was recodified at 49 U.S.C. § 40120, *et seq.* and termed the Federal Aviation Authority Authorization Act ("FAAAA"). The preemption clauses of the ADA, 49 U.S.C. § 1305 (also referred to as section 105) and of the FAAAA, section 41713, are analogous, and thus, may be referred to interchangeably.

and enforce various requirements. *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 378 (1992). The purpose of the enactment was to "dismantle the pervasive federal economic regulation of the interstate airline industry." *Fenn v. American Airlines*, 839 F. Supp. 1218, 1220 (S.D. Miss. 1993). Congress included a preemption clause (Section 41713 of the Act[2]), which was designed to ensure that states could not frustrate the benefits of deregulation by enacting their own forms of economic regulation:

> [A] state . . . may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier that may provide air transportation under this subpart.

As set forth by Northwest, this Court has, on two other occasions, analyzed the scope of ADA preemption. *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 391 (1992); *American Airlines v. Wolens*, 513 U.S. 219 (1995). In *Morales*, the National Association of Attorneys General ("NAAG") adopted Air Travel Industry Enforcement Guidelines. *Morales*, 504 U.S. at 379. These Guidelines contained detailed standards governing the content and format of airline advertising, the awarding of premiums to regular customers, and the payment of compensation for overbooked flights. The Guidelines were sent to major airlines and those airlines filed suit asserting that state regulation of fare advertising is preempted under § 1305(a)(1) of the ADA. *Id.* at 380. As a result, the Court concluded that the NAAG fair advertising guidelines were

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[2] 49 U.S.C. § 41713(b)(1).

preempted under the ADA. *Id.* at 390.[3] However, the Court limited the scope of its ruling:

> [W]e do not, as Texas contends, set out on a road that leads to pre-emption [sic] of state laws against gambling and prostitution as applied to airlines. Nor need we address whether state regulation of the nonprice aspects of fare advertising (for example, state laws preventing obscene depictions [sic]) would similarly "relate to" rates; the connection would obviously be far more tenuous. To adapt to this case our language in *Shaw*, "some state actions may affect [airlines fares] in too tenuous, remote, or peripheral a manner" to have pre-emptive [sic] effect. 463 U.S. at 100, n.21 [emphasis added]. In this case, as in *Shaw*, "the present litigation plainly does not present a borderline question, and we express no views about where it would be appropriate to draw the line." *Ibid.*

Id. (citing *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 100, n.21 (1983). The Court in *Morales* was clear that simply because a suit involved an airline or an aspect of air travel

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[3] In addition to the above, it is important to note that in Justice Stevens' well reasoned dissent he stressed to the Court that, with this ruling, they were wandering down a dark road. Indeed, as Justice Stevens noted, "[s]urely Congress could not have intended to pre-empt every state and local law and regulation that similarly increases the airlines' costs of doing business and, consequently, has a similar 'significant impact' upon their rates." *Id.* at 427 (Stevens, J., dissenting).

the suit was not *ipso facto* preempted unless it ran afoul of the goals underlying deregulation.

This Court was faced with ADA preemption again in the *Wolens* case. *Wolens* involved a claim for violation of the consumer protection act as well as a claim for breach of contract. In allowing the contract claim to proceed, the Court found it was not "plausible that Congress meant to channel into the federal courts the business of resolving, pursuant to judicially fashioned federal common law, the range of contract claims relating to airline rates, routes, or services." *Wolens*, 513 U.S. at 232. The Court found that "[t]he conclusion that the ADA permits state-law-based court adjudication of routine breach-of-contract claims also makes sense of Congress' retention of the FAA's savings clause." *Id.* (citing 49 U.S.C. App. § 1506 (recodified at 49 U.S.C. § 40120)).

According to Northwest, "in the wake of *Morales* and *Wolens* a striking conflict among the circuits has developed concerning the proper application of section 105(a)(1) to other kinds of state law tort claims and concerning the meaning of 'service' in that section." Pet. 10. This statement is wrong. While two circuit courts have formulated definitions of "service" that may differ; their decisions, as well as district court decisions, on "the proper application of section 105(a)(1) to" physical injury cases are harmonious. *See infra*, Part I, B.[4] As a result, the

[4] *See e.g., Heller v. Delta Air Lines, Inc.*, 1993 U.S. Dist. Lexis 11854 (S.D.N.Y. 1993) (where a claim by a passenger who sustained injuries from luggage falling from an overhead bin was not preempted); *Plagianos v. American Airlines, Inc.*, 912 F.2d 57, 59 (2d Cir. 1990) (where the Second Circuit set forth the standard of care for negligence claims against airlines from fallen luggage without even mentioning the potential for ADA preemption); *Margolis v. United*

differing definitions of "service" are immaterial in those types of cases.

B. There is No Conflict Among the Circuits

According to Northwest, the Circuit most at odds with the panel's decision in this case is the Fifth Circuit. Specifically, Northwest points to *Hodges v. Delta Airlines*, 44 F.3d 334 (5th Cir. 1995), which has defined "services" in a way that is different from the definition enunciated in the Ninth Circuit. However, an objective recitation of the *Hodges* opinion demonstrates that the panel's decision in this case is in accord with the *Hodges* decision. Importantly, neither circuit holds as preempted a physical injury claim against an airline.

In *Hodges*, a passenger was injured when a box of rum fell from an overhead bin and cut her arm and wrist. 44 F.3d at 335. The sole question before the court was whether her personal injury claim against the airline was preempted. *Id.* The court engaged in a discussion about both the *Morales* and *Wolens* cases noting that the Supreme Court warned "'some state actions may affect [airline

Airlines, Inc., 811 F. Supp. 318, 321 (E.D. Mich. 1993) ("state common law claim based on negligence and the standard of reasonable care does not purport to regulate the service that air carriers provide to their customers in exchange for their fares"); *Somes v. United Airlines, Inc.*, 33 F. Supp. 2d 78, 82 (D. Mass. 1999) ("Somes' claim is a common-law based personal injury action, which concerns health and safety, an area traditionally regulated by the states pursuant to their police powers"); *Barbakow v. USAir, Inc.*, 950 F. Supp. 1145, 1148 (S.D. Fla. 1996) ("Read together, the preemptive and enabling provisions do not require a negation of traditional common law tort remedies to recover damages for negligence resulting in physical harm."). *See also, infra* Part I, B.

services] in too tenuous, remote or peripheral a manner' to be preempted." *Hodges*, 44 F.3d at 336 (citing *Morales*, 504 U.S. at 390 (quoting *Shaw v. Delta Air Lines*, 463 U.S. at 100 n. 21)) (alteration in original).

When determining the scope of the term "service," the *Hodges* court reviewed the panel's decision in its case and merely stated that it "adhered" to the panel's definition of service *en banc*. *Hodges*, 44 F.3d at 336. However, contrary to Northwest's suggestions, this definition of "services" was not the sole basis for the court's decision. Rather, the court took into account the fact that airlines are required to maintain insurance "that covers 'amounts for which . . . air carriers may become liable for bodily injuries to or the death of any person . . . .'" *Id.* at 338 (citing 49 U.S.C. App. § 1371(q) (1994)). Like many other federal courts, including the Ninth Circuit, the court found that "[a] complete preemption of state law in this area would have rendered any requirement of insurance coverage nugatory." *Id.*; *See also Charas*, 160 F.3d at 1265 ("Complete preemption of state law in this arena would have rendered pointless this requirement for insurance."). Moreover, the *Hodges* court noted that there is no provision in the ADA or any of its legislative history that indicates Congress intended to displace personal physical injury claims. The court then reiterated this Court's finding in *Silkwood v. Kerr-McGee Corp.*, stating, "[i]t is difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct." *Hodges*, 44 F.3d at 338 (quoting *Silkwood*, 464 U.S. 238, 251 (1984)).

It thus follows that while the Fifth Circuit in *Hodges* set forth a definition of "services" that differs from the Ninth Circuit, its ruling is nonetheless harmonious

because it found, as in the Ninth, that physical injury claims are not amongst the types of claims preempted by the ADA. Specifically, "[e]nforcement of such tort duties normally will not have 'the forbidden significant effect' on airlines' services." *Hodges*, 44 F.3d at 339. Simply put, when focusing on congressional intent and economic effect, rather than the definition of the term "service" it is clear that the Fifth and Ninth circuits are consistent.

Attempting to convince the court that the differing definitions of "service" in the Fifth and Ninth Circuits will yield conflicting results, Northwest cites to *O'Carroll v. American Airlines*, 863 F.2d 11 (5th Cir.), *cert. denied*, 490 U.S. 1106 (1989). Northwest uses *O'Carroll* as an example of a tort claim preempted under the Fifth Circuit standard, which is allegedly different than the standard in the Ninth Circuit. But *O'Carroll* does not support Northwest's position that a conflict exists. As the Fifth Circuit in *Hodges* itself noted, in *O'Carroll* "[n]o claim was made that the airline breached any safety-related tort duty by bumping O'Carroll." *Hodges*, 44 F.3d at 339. Hence, while Northwest attempts to use *O'Carroll* as evidence that the Fifth Circuit solely relies on its definition of service to determine ADA preemption, and as a result, the Fifth Circuit is wholly at odds with the definition in the Ninth, the fact is, *O'Carroll* was not a personal injury claim nor did it involve any aspect of safety. "*O'Carroll* dealt with a claim for wrongful exclusion from a flight, essentially a contract action. Thus, [the airline]'s reliance on it is misplaced in the context of a negligence claim for personal injury." *Jamerson v. Atlantic Southeast Airlines*, 860 F. Supp. 821, 824 (M.D. Ala. 1994).

Northwest's citation to *Travel All Over the World v. Kingdom of Saudi Arabia*, 73 F.3d 1423 (7th Cir. 1996)

suffers from the same defect that *O'Caroll* suffered. Namely, *Travel All* did not involve personal physical injury. *Travel All* was a slander and defamation case and also involved individuals being refused travel unless they purchase an entirely new ticket. It did not involve a claim for physical personal injury and it appears the Seventh Circuit has yet to be presented with such a case. As the Northern District of Illinois noted in *Torraco v. American Airlines*, decided just prior to *Travel All*, "[t]o date, the Seventh Circuit has not directly addressed the issue of whether common law tort actions against airlines for physical injuries 'relate to services' [is] within the meaning of the ADA." 1995 U.S. Dist. Lexis 19547, at *8 (N.D. Ill. 1995).[5] Because *Travel All* did not involve physical injuries, the statement by the *Torraco* court is still true today. It thus follows that, to say the decisions in the Ninth Circuit conflict with the holdings of the Seventh Circuit is premature, at best.

In *Taj Mahal Travel v. Delta Airlines*, 164 F.3d 186 (3d Cir. 1998), the Third Circuit found that a plaintiff's defamation claims were not preempted because "[a]pplication of state law in these circumstances does not frustrate Congressional intent, nor does it impose a state utility-like regulation on the airlines." *Id.* at 195. Northwest cites to *Taj Mahal* for the proposition that circuit courts are now starting to take sides. Pet. 16. However, while Ms. Duncan maintains that *Taj Mahal* was properly decided, for purposes of Northwest's petition for certiorari

[5] In *Torraco*, the court found that Torraco's claims arising out of American's failure to provide him with a wheelchair, which resulted in him falling and suffering physical injury were "not preempted under Section 1305." *Torraco*, 1995 U.S. Dist. Lexis 19547, at *15.

it is of limited application, as it does not involve a personal injury claim.[6]

Northwest continues its citation to inapplicable authority with *Parise v. Delta Airlines*, 141 F.3d 1463 (11th Cir. 1998), Pet. 14, suggesting that the Eleventh Circuit is also in conflict with the opinion in this case. However, as a district court within the Eleventh Circuit had found a few years prior to *Parise*, "the Eleventh Circuit has not addressed the issue of whether or not § 1305(a)(1) preempts common law tort actions for physical injuries against airlines." *Jamerson v. Atlantic Southeast Airlines*, 860 F. Supp. 821, 826 (M.D. Ala. 1994). Because *Parise* does not involve physical injuries, the Eleventh Circuit has still not addressed the issue. Importantly, however, the Middle District of Alabama in *Jamerson* speculated that, if faced with the issue of personal injury claims against airlines, the Eleventh Circuit would not preempt personal physical injury claims. 860 F. Supp. at 826 (citing *Kay v. USAir, Inc.*, 1994 U.S. Dist. Lexis 10662 (E.D. Pa. 1994)[7]; *Margolis v. United Airlines, Inc.*, 811 F. Supp. 318 (E.D.

[6] Northwest suggests that Ms. Duncan's claim is preempted as a matter of field preemption under *Abdullah v. American Airlines, Inc.*, 181 F.3d 363, 367 (3d Cir. 1999). Pet. 16, n.6. Though Northwest's suggestion is misleading, more importantly, it is immaterial. As the Third Circuit noted, "[e]ven though we have found federal preemption of the standards of aviation safety, we still conclude that the traditional state and territorial law remedies continue to exist for violation of those standards." *Id.* at 375; *see also, Bieneman v. City of Chicago*, 864 F.2d 463, 471 (7th Cir. 1988), *cert. denied*, 490 U.S. 1080 (1989) ("[s]tate courts award damages every day in air crash cases, notwithstanding that federal law preempts the regulation of safety in air travel").

[7] In *Kay*, the court found preemption clause does not apply to claim for personal injuries suffered when disembarking airplane. 1994 U.S. Dist. Lexis 10662, at *7.

Mich. 1993)).[8] Other district courts within the Eleventh Circuit are in accord with the findings of the *Jamerson* court. *See e.g., Barbakow v. USAir, Inc.*, 950 F. Supp. 1145, 1148 (S.D. Fla. 1996).[9] In the end, the Eleventh Circuit has not even reached the issue before the Court and, more importantly, district courts within the Eleventh Circuit that have addressed the issue are harmonious with the findings of the Ninth Circuit.[10]

C. The Practical Impact of the Unanimous Holdings of the Federal Courts is that Airlines Will be Held to the Same Standards As Any Tortfeasor When They Cause Personal Physical Injury

Northwest attempts to elicit sympathy from this Court by stating that under the conflicting authority, airlines could be subject to different state regulations from state to state. Pet. 19-20. For example, Northwest argues that "the split among the circuits" will cause differing rules on boarding policies and the like from state to state. Pet. 19. But the only policy involved in this case is Northwest's

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[8] The court in *Margolis* found that "Congress has expressed no intent to preempt traditional state law claims for negligence." 811 F. Supp. at 323.

[9] The *Barbakow* court stated that "[i]t is not shown from the case law that Congress left no room for the States to act in providing a remedy for personal injury claims caused by an air carrier's negligence." 950 F. Supp. at 1148.

[10] Northwest again misses the mark with its citation to *Smith v. Comair, Inc.*, 134 F.3d 254 (4th Cir. 1998), Pet. 14. *Smith* did not involve a personal physical injury claim. As demonstrated throughout this opposition, court after court has unanimously held that a personal injury claim creates a distinction with a difference.

smoking policy. And whether Northwest is liable for damages based on an allegation that this policy caused physical injury. Ms. Duncan is not trying to regulate the smoking policy. Even if she wanted to, she could not as the federal government has already determined that smoking on airlines is prohibited. Pet. 3, n.1. Hence, the only issue left is whether Northwest is liable to Ms. Duncan for money damages resulting from the physical injury. A tort award in this case is a far cry from state regulation of "such matters as whether airlines may permit first-class passengers to board first." Pet. 19.

Moreover, as discussed more fully, *infra* Part II, Northwest's claims of "patchwork regulation" are unfounded, as the court in *Somes v. United Airlines, Inc.*, 33 F. Supp. 2d 78 (D. Mass. 1999) recognized:

> [The argument that] Congress' deregulatory goal of avoiding patchwork regulation of airlines compels the conclusion that it must have had an expansive view of airline 'services' is without merit. It fails to recognize that all state claims, whether they have the 'forbidden significant effect' on '... service' or not, potentially subject airlines to patchwork regulation. . . . [L]iterally applied, United's definition of 'services' amounts to an argument for total preemption – a proposition that has been rejected by the Supreme Court.

Id. at 84 (citing *Wolens*, 513 U.S. at 234. In addition to the lack of merit, its claims of "patchwork regulation" are nothing more than sheer speculation. Northwest hypothecates about what could happen to its business from

state to state – but to date – nothing has and it is unlikely that it ever will.

II. EXPOSING AIRLINES TO LIABILITY FOR PERSONAL INJURY CLAIMS DOES NOT RUN AFOUL OF CONGRESSIONAL INTENT AND IS NOT OF SUCH IMPORTANCE THAT REVIEW IS WARRANTED

With its back against the wall, Northwest cries for review on the grounds that "the Ninth Circuit's approach is clearly wrong." Pet. 21. Supreme Court Rule 10 sets forth that review on writ of certiorari "is not a matter of right, but of judicial discretion." As stated in the rule, a petition will only be granted for "compelling reasons." *Id.* While not an exhaustive list, Rule 10 does set forth three reasons it deems compelling. Unfortunately for Northwest, believing that a court has taken a "wrong approach" is not enumerated within Rule 10. Even if a petitioner could seek review on such a ground, it would be unhelpful in this case.

According to Northwest, the Ninth Circuit "has adopted a definition of the word 'service' that renders it entirely redundant of the immediately preceding word 'route.'" Pet. 21. Yet, absent from Northwest's argument is a judicial interpretation of the word "route." Hence, there is no way of knowing at this point and time whether the two terms are in fact, redundant. Regardless, this type of semantical gamesmanship is unnecessary in cases involving claims for personal physical injury. Indeed, even Northwest's leading case on establishing "the conflict" notes that personal physical injury cases are simply too tenuously related to any type of service – regardless of the definition. *Hodges*, 44 F.3d at 339 ("Enforcement of such

tort duties normally will not have 'the forbidden significant effect' on airlines' services.").

Northwest contends that Ninth Circuit's refusal to include various "amenities" in the term "services" has stifled its ability to compete because it is through these "services and amenities that help to distinguish one airline from another in the competitive marketplace." Pet. 21. Ms. Duncan proposes that permissible forms of competition do not include requiring employees to suffer continuous exposure to toxic fumes with no accountability. Sacrificing human health and lives to maintain a competitive edge is at all times culpable behavior. If human lives are no longer sacred it is alarming to think what the future holds for the type of "services" airlines will offer to bolster their competitive edge. In addition, this Court has already acknowledged that the ADA is not so broad as to lead "to pre-emption [sic] of state laws against gambling and prostitution as applied to airlines." *Morales*, at 390. In light of this admonition, if an airline sought to offer the service of gambling or prostitution on flights in order to bolster sales and "effectively compete" these would not be permissible.

Northwest asserts that the Ninth Circuit was wrong because it ignored the findings of the Civil Aeronautics Board that "smoking rules" are included in "services." Pet. 22. However, the Civil Aeronautics Board also found that its findings with respect to "smoking" are not binding in the arena of workplace safety:

> The Board recognizes that flight attendants, because of longer exposure, are in a different position from passengers with respect to passive smoking. Their working conditions,

> however, are the direct concern of some agency other than the CAB.

44 Fed. Reg. 9948 (1979).[11]

According to Northwest, the Ninth Circuit is also wrong because "if an airline's policies conflict with the policies of any given state, that state's laws and policies will control." Pet. 21-22. This is simply an inaccurate interpretation of the Ninth Circuit's holding in this case. First, it was Northwest's own business decision that determined smoking was no longer permitted. It was not the threat of a tort damage award. Second, even if Northwest had not banned smoking on its own, the issue was recently foreclosed by federal smoking regulations. *See* Pet. 3. Third, and by way of example, both the Fifth and Ninth circuits clearly allow for a damage award in cases where luggage falls from the overhead bin and physically injures a passenger. *See Hodges; Charas.* Despite these tort awards, airlines continue to allow carry-on luggage. This demonstrates that an award of damages in

[11] It is not clear what "agency other than the CAB" is in fact concerned with flight attendant's working conditions. The CAB likely was referring to the FAA. But as the Seventh Circuit noted, "state courts award damages every day in air crash cases, notwithstanding that federal law preempts the regulation of safety in air travel," no doubt because "[t]he Federal Aviation Act does not expressly preempt state damages remedies." *Bieneman v. City of Chicago,* 864 F.2d 463, 471 (7th Cir. 1988), *cert. denied*, 490 U.S. 1080 (1989). Indeed, FAA safety regulations merely establish minimum standards. They do not preclude a finding of negligence under state standards where a reasonable person would take additional precautions. *Sunbird Air Servs., Inc. v. Beech Aircraft Corp.*, 789 F. Supp. 360, 362-63 (D. Kan. 1992); *see also Holliday v. Bell Helicopters Textron, Inc.*, 747 F. Supp. 1396, 1401 (D. Haw. 1990) ("nothing in the FAA indicates that states may not require aircraft to be more safe or better designed").

these cases involving physical injury does not affect an airline's ability to compete. Moreover, it also demonstrates that, despite differing definitions of "services," the rule of law as to physical injury claims are in accord.

Finally, Northwest argues that the Ninth Circuit's decision conflicts with this Court's finding because the Ninth Circuit has refused to "allow preemption of any tort claim even if it would have the indirect effect of forcing the airline to alter the routes it chooses to fly." Pet. 23. This is simply untrue. The court below found that the relationship in this case to a preempted service was too tenuous to warrant preemption. Pet. App. 7a. The finding was based on the fact that "all successful tort suits . . . invariably carry with them an economic cost for the defendant airline. Such cases may even, in some instances, cause the airline to decide to make changes in its operations." *Id.* However, "the imposition of liability as a result of a personal injury action does not sufficiently interfere with the objectives of airline deregulation to warrant preemption of the action – in other words, the connection between an award in a tort case and an airline's 'services' is simply too tenuous." *Id.* This is not an "unyielding" interpretation. Pet. 23. It simply states that holding airlines responsible for their negligent conduct that causes physical harm may cause the airline to change its operations, or, it may not. The point made is that airlines are free to compete; however, when, as a result of their competition, they cause physical injury to passengers or crew, they can be held legally liable for those injuries.

Much to the disappoint of the airlines, this case simply presents no issue appropriate for Supreme Court review. The circuits are in harmony and Congressional intent is not being frustrated. Supreme Court precedent,

circuit court holdings and provisions within the ADA all point to the fact that Congress never intended to preempt personal physical injury claims. It would simply be premature for the Supreme Court to rule in the area of physical injury claims when there are only two circuit court decisions to date and these decisions do not conflict. Moreover, because many circuits have yet to address physical injury claims against airlines – but district courts within those circuits suggest that the circuit court would rule harmoniously – time may further illuminate how other circuits will address the issue. *See generally Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70 (1955); *See also Columbus Fruit & Vegetable Cooperative Ass'n v. United States*, 8 Cl. Ct. 525, 529 (1985) (citing *United States v. Mendoza*, 464 U.S. 154 (1984)) (Emphasizing the benefit derived "'from permitting several courts of appeals to explore a difficult question,' because, in deciding whether to grant a petition for certiorari, the Supreme Court adheres to a practice of waiting for conflicting decisions to arise with respect to a particular issue."). Hence, this case does not present the type of "compelling reason" contemplated by Supreme Court Rule 10.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 00-404

IN THE

Supreme Court of the United States

NORTHWEST AIRLINES, INC.,

Petitioner,

v.

JULIE DUNCAN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF *AMICUS CURIAE* AIR TRANSPORT ASSOCIATION OF AMERICA IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Did the court of appeals err when it held — despite the "deliberately expansive" preemptive sweep of the Airline Deregulation Act of 1978, *Morales v. Trans World Airlines*, 504 U.S. 374, 384 (1992) — that states and localities are free to regulate the services a commercial airline can or must provide, so long as the state or locality does not prescribe (a) the cities to which the carrier can fly; (b) the times at which the carrier offers its flights or frequency with which it flies them; or (c) the price the carrier charges for its services?

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INTERESTS OF THE *AMICUS CURIAE*[1]

1. The Air Transport Association of America ("ATA") is a membership organization of 23 U.S. certificated air carriers. ATA's members account for more than 97% of the domestic passenger and cargo traffic flown annually by U.S. carriers, and employ over half a million people.[2] ATA regularly represents the interests of its member carriers in legislative, judicial and administrative matters. ATA has filed numerous *amicus* briefs in this Court and in other federal and state court proceedings concerning a broad variety of cases related to the safe and efficient operations of air carrier operations.[3] ATA also works closely with various Federal agencies that regulate the airline industry such as the Federal Aviation Administration and the Department of Transportation.

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1. Petitioner and Respondent have consented to the filing of this brief and their consent letters are filed herewith. Northwest Airlines is a member of ATA, but no party has authored this brief in whole or in part and no party has made a monetary contribution to the preparation or filing of this brief.

2. ATA's members are Airborne Express, Alaska Airlines, Aloha Airlines, America West Airlines, American Airlines, American Trans Air, Atlas Air, Continental Airlines, Delta Air Lines, DHL Airways, Emery Worldwide, Evergreen International, Federal Express, Hawaiian Airlines, Midwest Express Airlines, Northwest Airlines, Polar Air Cargo, Reeve Aleutian Airways, Southwest Airlines, Trans World Airlines, United Airlines, United Parcel Service, and US Airways. Associate members are Aerovias de Mexico, Air Canada, Canadian Airlines International, KLM-Royal Dutch Airlines, and Mexicana de Aviacion.

3. *See, e.g., Eastern Assoc. Coal Corp. v. United Mine Workers of America, Dist. 17*, No. 99-1038 (S. Ct.); *Sutton v. United Airlines*, 527 U.S. 471 (1999); *Northwest Airlines v. Air Line Pilots Association*, 486 U.S. 1014 (1988).

2. This case was brought under Washington tort law by flight attendants who claim that they were injured by second-hand smoke on Northwest Airlines flights to Asia. The district court held that to the extent Washington tort law would otherwise have applied to this scenario, it was preempted by the Airline Deregulation Act of 1978 ("ADA"), which prohibits any state attempt to regulate services provided by a covered airline. The Ninth Circuit reversed.

3. The issues posed by this case are of vital concern to ATA's members. First, the court of appeals decision in this case both exemplifies and exacerbates a profound difference of opinion among the courts of appeals regarding the degree to which the services provided by airlines may be prescribed, or proscribed, by states and localities around the country. Because each of ATA's members does business in a number of states — and some do business in nearly every state — this persisting conflict of opinion on a matter of federal law fundamental to the operations of the airline business creates unacceptable uncertainty and confusion. More than anything else, ATA's members seek a single, clear, and reliable rule of law to which they can look for purposes of planning and compliance.

Second, the substantive rule of law embraced by the court of appeals cedes to every state (and presumably every political subdivision within every state) the authority to dictate to ATA's members the services they must — or may not — provide, so long as the regulating authority steers clear of dictating where and when the airline flies and the prices it charges. This reading of the Airline Deregulation Act is unjustified as a matter of statutory construction, as explained *infra*, but even more, it subjects the airlines to precisely the sort of varying, even incompatible, obligations that Congress

attempted to avoid when it passed the ADA. Airlines simply cannot compete as Congress intended, or function as efficient, affordable tools of interstate commerce, if their in-flight services are subject to the regulatory dictates of states and local governments.

Third, smoking on commercial air carriers has been regulated by the Federal government for decades, first by Civil Aeronautics Board and subsequently by the Department of Transportation (*see* 14 C.F.R. Part 252) — and the FAA has regulated on the subject of cabin air quality and ventilation.[4] 14 C.F.R. § 25.831 (2000). The regime constructed by the court below, however, places these matters simultaneously within the jurisdiction of these federal agencies *and* every community in which an ATA member operates. This result is simply unacceptable, and complicates the efforts of ATA member airlines to deliver on the promise of "an air transportation system relying on actual and potential competition — (A) to provide efficiency, innovation and low prices; and (B) to decide on the variety and quality of . . . air transportation services." 49 U.S.C. § 40101(a)(12).[5]

ATA is uniquely situated to inform the Court regarding the industry's perspective on these critical matters. For

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4. *See* 14 C.F.R. Part 252; *Allowable Carbon Dioxide Concentration in Transport Category Airplane Cabins*, pt. II, 59 Fed. Reg. 22718 (1994).

5. The issue of the Federal Aviation Administration's broad, exclusive authority over the safety of air transportation, and therefore "field" preemption under the Federal Aviation Act, was not raised below, decided by the court of appeals, or raised in the petition. Therefore that issue is not before the Court.

these reasons, ATA seeks to participate in this case as *amicus curiae*.

SUMMARY OF ARGUMENT

1. A principal animating purpose of the ADA was "to rationalize [the] confusing system of dual regulation of federally certificated air carriers" in place in 1978.[6] That desired goal has been frustrated, however, by a persisting division of authority over the proper construction to be given the Act's express preemption provision, which forbids state and local governments from exercising dominion over matters "related to a price, route, or service" of covered airlines. 49 U.S.C. § 41713(b)(1).[7] At least eight circuits have weighed in on the controversy, and they have devised at least three different approaches to parsing the language of the Act. Two circuits — the Third and the Ninth — have given the provision the unjustified, parsimonious construction at issue here. In varying degree, three others — the Fourth, Fifth, and Seventh — have given a more natural reading to the statute, and thus have given the statute a more vigorous preemptive force. The Second and Eleventh Circuits have developed their own balancing tests, with uncertain implications for the statute's preemptive reach.

This conflict, on an important and recurring issue of federal law, is intolerable. As Congress recognized in passing the ADA, airlines, by their very nature, need a single, reliable standard in order to permit vigorous competition and to

6. S. Rep. No. 95-631, at 98 (1978).

7. In 1994, Congress amended the ADA, *inter alia*, to change the statutory term "rates" to "price." As the court of appeals noted, the change was intended to be non-substantive. Pet. App. 3a n.4.

operate efficiently and effectively in the public interest. The varying interpretations given this important provision have frustrated that goal. Indeed, Delta Air Lines — an ATA member — has litigated the ADA's preemption provision in four different courts of appeals and has received four different, and in some instances mutually exclusive, answers regarding its scope.[8]

The lower courts have acknowledged this confusion, and have expressed no small degree of frustration at the lack of definitive guidance at their disposal. This case offers an ideal opportunity to resolve the existing conflict and establish one preemption standard regarding airline "services" by which future cases might be judged.

2. Before enacting the ADA, Congress considered a number of proposals to limit the scope of state and local interference with airline economic and competition-based decisions. The one it adopted is "conspicuous for its breadth" — a "deliberately expansive" rule of exclusion[9] that prohibits states and localities from interfering with any matters "related to [an air carriers'] price, route, *or service*. . . ." 49 U.S.C. § 41713(b)(1) (emphasis added).

According to the court of appeals, however, a state rule of law or regulation falls within the scope of this phrase only if it dictates the "prices, schedules, origins and destinations of the point-to-point transportation of passengers, cargo, or

8. *Compare Hodges v. Delta Airlines*, 44 F.3d 334 (5th Cir. 1995), *with Taj Mahal Travel, Inc. v. Delta Airlines*, 164 F.3d 186 (3d Cir. 1998); *Parise v. Delta Airlines*, 141 F.3d 1463 (11th Cir. 1998); *and Abdu-Brisson v. Delta Airlines*, 128 F.3d 77 (2d Cir. 1997).

9. *Morales v. Trans World Airlines*, 504 U.S. 374, 384 (1992).

mail." Pet. App. 4a. Because "prices, schedules, origins and destinations" are undeniably items relating to an airline's "prices" and "routes," the construction adopted by the court of appeals reads the word "services" out of the statute altogether.

That result is untenable as a matter of statutory construction. This Court has repeatedly, and recently, admonished that every word of a statute must be given life if at all possible, and, more specifically, that each word in a statute should be given its natural and commonplace meaning. *See infra* at 10. The court below breached this fundamental rule.

REASONS FOR GRANTING THE WRIT

I. REVIEW BY THIS COURT IS NECESSARY TO RESOLVE A PATENT CONFLICT AMONG THE CIRCUITS ON AN IMPORTANT ISSUE OF FEDERAL LAW

This Court has noted that there are circumstances in which divisions of opinion among the circuit courts on questions of federal law are tolerable. For example, a split of authority may concern a question of law that is technical or unimportant, or that arises too infrequently, to warrant treatment by the Court. Similarly, the Court has declined to review cases involving circuit splits — even on important issues — where only a few lower courts have addressed the issue and the questions presented require "further study" in the lower courts.[10] Finally, the Court has declined to review

10. *See McCray v. New York*, 461 U.S. 961, 963 (1983) (Stevens, J.; dissenting from the denial of *cert.*); *Gilliard v. Mississippi*, 464 U.S. 867 (1983) (Brennan, J. and Marshall, J.; dissenting from the denial of *cert.*).

cases where a disagreement among the courts of appeals on a matter of law has been overtaken by subsequent events — for example, when the underlying statute has since been amended or has expired.[11] None of these circumstances is present here.

1. There is a patent and intractable conflict among the lower courts on a question of vital importance. Congress passed the Airline Deregulation Act of 1978 in substantial part "to rationalize [the] confusing system of dual regulation of federally certificated air carriers" then in place. S. Rep. No. 95-631, at 98 (1978). The committee responsible for drafting the Act intended that "*only one standard of regulation* be provided for airlines operating under the authority" of federal law. *Id.* (emphasis added).

This primary legislative goal of the Act has been frustrated by varied interpretations of the express preemption provision of the statute, codified at 49 U.S.C. § 41713(b)(1). That subsection preempts any provision of state or local law "related to a price, route, or service of an air carrier. . . ." Three courts of appeals have agreed that the term "service" as used in this section denotes "a bargained-for or anticipated provision of labor from one party to another." *Hodges v. Delta Airlines*, 44 F.3d 334, 336 (5th Cir. 1995); *see also Smith v. Comair, Inc.*, 134 F.3d 254 (4th Cir. 1998); *Travel All Over the World, Inc. v. Kingdom of Saudi Arabia*, 73 F.3d 1423 (7th Cir. 1996). Thus, in these circuits, "[e]lements of the air carrier service bargain include items such as ticketing, boarding procedures, provision of food and drink, and baggage handling, in addition to the transportation itself." 44 F.3d at 336 (emphasis omitted).

11. *See, e.g., United States v. Abrams*, 344 U.S. 855 (1952).

In the Third and Ninth Circuits, the meaning of the word "service" is markedly different — resulting in substantially greater power for states and localities to enact mandates or prohibitions relating to airline practices traditionally viewed as services on which airlines compete. In these circuits, and as explained by the court below in this case, the term "service" has no meaning in the context of this statute independent from the terms "price" and "route." Pet. App. 4a-6a; *Taj Mahal Travel, Inc. v. Delta Airlines*, 164 F.3d 186 (3d Cir. 1998). Specifically, the court below explained that " '[r]ates' indicates price; 'routes' refers to courses of travel. It therefore follows that 'service,' when juxtaposed to ['price'] and 'routes,' refers to such things as frequency and scheduling of transportation, and to the selection of markets to or from which transportation is provided." Pet. App. 5a. In these circuits, the term service does *not* include "provision of in-flight beverages, personal assistance to passengers, the handling of luggage, and similar amenities." *Id.*

In the Eleventh Circuit, the analysis is more quantitative than qualitative. There, a law relating to airline services becomes preempted only if compliance with the law "would have a significant impact upon the airlines' ability to market their product, and hence a significant impact upon the fares they charge." *Parise v. Delta Airlines*, 141 F.3d 1463, 1465 (11th Cir. 1998).

Finally, in the Second Circuit, the term takes on an uncertain meaning unconnected to any commonly accepted definition of the term. *Abdu-Brisson v. Delta Airlines*, 128 F.3d 77, 84 (2d Cir. 1997). Rather, in that circuit, a court is to ask itself whether, in a particular instance, "the dangers and hardships of diverse regulation justify

foreclosing a State from the exercise of its traditional powers." *Id.* (citation omitted).

As a result of this chaotic state of affairs, a county board of supervisors in California could, for example, prohibit an airline from showing any in-flight movies, another community, perhaps even another community in California, could require them to be shown, while a third community in Illinois would be prohibited from regulating on the subject altogether.

There is one undeniable fact at work in all of these cases: "[i]n the absence of definitive guidance from the Supreme Court, the Courts of Appeals have struggled [and will continue to struggle] with the relationship between the Act's preemption clause and state tort claims." *Taj Mahal Travel*, 164 F.3d at 192.

2. The meaning of the ADA's preemption language arises with great frequency. Just since the beginning of 1995, the year when this Court issued its last ADA preemption decision, there have been approximately 50 reported decisions debating the scope of the ADA's preemption provision. *See* appendix to this brief.

3. Review in this Court would not be premature. Eight courts of appeals have published decisions since 1995 on the scope of ADA preemption — seven on the meaning of the word "service" as it is used in that statute — and the resulting rules of law are disparate and irreconcilable. This disparity is incompatible with Congressional design — *i.e.*, "to rationalize [the] confusing system of dual regulation of federally certificated air carriers" in place prior to passage of the ADA, and it frustrates the competitive goals at the

heart of the Act.[12] This controversy is a live and important one, and it will not go away unless and until this Court resolves the matter.

II. THE COURT BELOW ERRED

A. The Court Of Appeals' Reading Of The ADA Preemption Provision Violates Rudimentary Principles Of Statutory Construction

This Court has marked out the proper procedure for analyzing statutory language on many occasions. The process is supposed to begin (and often will end) with the language of the statute itself.[13] "It is our duty 'to give effect, if possible, to every clause and word of a statute' rather than to emasculate an entire section. . . ." *United States v. Menasche*, 348 U.S. 528, 538-39 (1955) (citation omitted); *accord National Endowment for the Arts v. Finley*, 524 U.S. 569, 609 (1998) ("[s]tatutory interpretations that 'render superfluous other provisions in the same enactment' are strongly disfavored"); *Hohn v. United States*, 524 U.S. 236, 249 (1998) (same); *Kawaauhau v. Geiger*, 523 U.S. 57 (1998) (same); *Freytag v. Commissioner*, 501 U.S. 868, 877 (1991) (same).

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12. S. Rep. No. 95-631, at 98 (1978).

13. "[T]he meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain . . . the sole function of the courts is to enforce it according to its terms." *Caminetti v. United States*, 242 U.S. 470, 485 (1917); *see also Diamond v. Chakrabarty*, 447 U.S. 303, 308 (1980) ("cases of statutory construction . . . begin, of course, with the language of the statute"); *Southeastern Community College v. Davis*, 442 U.S. 397, 405 (1979) (same).

In this instance, the court of appeals concluded that the statutory term "service" added nothing to the preemptive scope of the statute not already embraced by the other two words in the series — "price" and "route." Specifically, the court concluded that

> Congress used the word "service" in the phrase "[price], route, or service" in the ADA's preemption clause to refer to the prices, schedules, origins, and destinations of the point-to-point transportation of passengers, cargo, or mail.

Pet. App. 4a.

This cannot be. Each of the examples given by the court is already embraced within — or synonymous with — one of the other two words in the series. The prices an airline charges are explicitly covered. "Schedules," "origins" and "destinations" define an airline's "routes." If the Court is to give effect "to every word, clause, and sentence of [the] statute," there must be more to the meaning of the term "service" than the court of appeals was willing to admit.

When an interstate compact attempted to enforce a similarly constricted reading of the preemption provision — one that "read the words 'related to' out of the statute" — this Court granted certiorari to correct the error, because such an unwarranted expansion of state and local regulatory power undermined Congress's legislative design. *Morales*, 504 U.S. at 385. Certiorari is warranted here for the same reason.

B. The Construction Given The Statute Below Is Inconsistent With This Court's Previous Guidance

Apart from this fundamental principle of statutory construction, the artificial construction given the statute below is at odds with this Court's prior opinion on the subject. In *American Airlines v. Wolens*, 513 U.S. 219 (1995), the Court instructed that

> the ban on enacting or enforcing any law "relating to [prices], routes, or services" is most sensibly read, in light of the ADA's overarching deregulatory purpose, to mean "States may not seek to impose their own public policies or theories of competition or regulation on the operations of an air carrier."

Id. at 229 n.5 (citation omitted).

As construed by the court below, the ADA would serve no "overarching deregulatory purpose"; indeed, it would work as an incubator for regulation. Every state would be authorized to "impose [its] own public policies" on the in-flight services and operations of an airline, regardless of its impact on the national transportation system, so long as it does so without dictating "prices, schedules, origins and destinations of the point-to-point transportation of passengers." Pet. App. 4a.

Thus, if Salt Lake City decided to ban alcoholic beverages on flights into and out of its airport it could — because the Act does not preempt local regulation of "an airline's provision of in-flight beverages." Pet. App. 5a. If California decided that its state interests would be served

by *compelling* airlines to serve wine on board flights (presuming that such a compulsion would aid its vintners), it could because the Act does not preempt local regulation of "an airline's provision of in-flight beverages." *Id.* And if the result of these two local regulations is that no airline can provide direct service between San Francisco and Salt Lake City, in the Ninth Circuit's view the ADA's preemption clause is not implicated because neither jurisdiction has attempted to dictate "prices, schedules, origins and destinations of the point-to-point transportation of passengers." Pet. App. 4a.

This regulatory nightmare is not mere hypothesis. In *Tall Club of Silicon Valley v. American Airlines*, 2000.WL 868524 (N.D. Cal. June 19, 2000), for example, a group of individuals sued a number of ATA members under California state law to require the airlines to reserve a certain number of seats with additional leg room for passengers over 6'2" tall. Relying on the Ninth Circuit construction at issue in this case, the district court concluded that the ADA does not prevent states and localities from regulating the configuration of seats in the cabins of ATA- member aircraft. The court reasoned that the term "services" applies only to "such things as frequency and scheduling of transportation, and to the selection of markets. . . ." *Id.* at *3.

Under this construction of the ADA, every community would be free to "impose [its] own public policies," *Wolens*, 513 U.S. at 229 n.5, on countless details of airline services. Congress has decided, however, that, as a practical matter, these matters can rationally be subject to "only one standard of regulation." S. Rep. No. 95-631, at 98 (1978). The court of appeals erred, and *certiorari* is warranted.

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX — RELEVANT CASES IN THE COURTS OF APPEALS AND THE DISTRICT COURTS

COURT OF APPEALS

Aloha Islandair Inc. v. Tseu, 128 F.3d 1301 (9th Cir. 1997)

American Airlines, Incorporated v. Department of Transportation, 202 F.3d 788 (5th Cir. 2000)

Charas v Trans World Airlines, Inc., 160 F.3d 1259 (9th Cir. 1998)

Duncan v. Northwest Airlines, Inc., 208 F.3d 1112 (9th Cir. 2000)

Gee v. Southwest Airlines, 110 F.3d 1400 (9th Cir. 1997)

Harris v. American Airlines, Inc., 55 F.3d 1472 (9th Cir. 1995)

Hodges v. Delta Airlines, Inc., 44 F.3d 334 (5th Cir. 1995)

Musson Theatrical, Inc. v. Federal Express Corporation, 89 F.3d 1244 (6th Cir. 1996)

Newman v. American Airlines, Inc., 176 F.3d 1128 (9th Cir. 1999)

Parise v. Delta Airlines, Inc., 141 F.3d 1463 (11th Cir. 1998)

Smith v. America West Airlines, Inc., 44 F.3d 344 (5th Cir. 1995)

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Smith v. Comair, Incorporated, 134 F.3d 254 (4th Cir. 1998)

Taj Mahal Travel, Inc. v. Delta Airlines Inc., 164 F.3d 186 (3d Cir. 1998)

Travel All Over The World, Inc. v. Kingdom of Saudi Arabia, 73 F.3d 1423 (7th Cir. 1996)

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Air Transportation Excise Tax Litigation, 37 F. Supp. 2d 1133 (D. Minn. 1999)

Barbakow v. USAir, Inc., 950 F. Supp. 1145 (S.D. Fla. 1996)

Breitling U.S.A. Inc. v. Federal Express Corp., 45 F. Supp. 2d 179 (D. Conn. 1999)

Cash America Pawn, L.P. v. Federal Express Corporation, 109 F. Supp. 2d 513 (N.D. Tex. 2000)

Chrissafis v. Continental Airlines, Inc., 940 F. Supp. 1292 (N.D. Ill. 1996)

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Chukwu v. Board of Directors Varig Airline, 880 F. Supp. 891 (D. Mass. 1995)

Costa v. American Airlines, Inc., 892 F. Supp. 237 (C.D. Calif. 1995)

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Federal Express Corporation v. United States Postal Service, 55 F. Supp. 2d 813 (W.D. Tenn. 1999)

Galbut v. American Airlines, Inc., 27 F. Supp. 2d 146 (E.D.N.Y. 1997)

Greer v. Federal Express, 66 F. Supp. 2d 870 (W.D. Ken. 1999)

Hijacking of Pan American World Airways, Inc. Aircraft at Karachi International Airport, Pakistan on September 5, 1986 v. Pan American World Airways, Inc., 920 F. Supp. 408 (S.D.N.Y. 1996)

Huntleigh Corporation v. Louisiana State Board of Private Security Examiners, 906 F. Supp. 357 (M.D. La. 1995)

Kelley v. United Airlines, Inc., 986 F. Supp. 684 (D. Mass. 1997)

Lewis v. Continental Airlines, Inc., 40 F. Supp. 2d 406 (S.D. Tex. 1999)

Manning v. Skywest Airlines, 946 F. Supp. 767 (C.D. Calif. 1996)

McLaughlin v. TWA Getaway Vacations, Inc., 979 F. Supp. 174 (S.D.N.Y. 1997)

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Somes v. United Airlines, Inc., 33 F. Supp. 2d 78 (D. Mass. 1999)

Stearns Airport Equipment Co., Inc. v. FMC Corporation, 977 F. Supp. 1263 (N.D. Tex. 1996)

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Trinidad v. American Airlines, Inc., 932 F. Supp. 521 (S.D.N.Y. 1996)

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(4)

No. 00-404

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

NORTHWEST AIRLINES, INC.,
Petitioner,

v.

JULIE DUNCAN,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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STATUTES

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49 U.S.C. § 41713(b)(1) 1

REPLY BRIEF OF PETITIONER

Respondent's entire Brief in Opposition can be reduced to a single proposition: no court of appeals has held that a run-of-the-mill personal injury claim is preempted under section 105(a)(1) of the Airline Deregulation Act ("ADA"), 49 U.S.C. § 41713(b)(1). But this is not a run-of-the mill personal injury case. Although respondent's alleged injuries are of a physical nature, she is not merely claiming that she was victimized by some isolated negligent acts. In fact, she sought injunctive relief on behalf of a class composed of flight attendants who have flown on Northwest flights where smoking was allowed. She has thus mounted a direct state-law challenge to the legality of an airline *policy* regarding the rendition of a particular *service*. As a result, the case presents squarely the acknowledged circuit split over the proper definition of the term "service" in the ADA. 49 U.S.C. § 41713(b)(1). Moreover, the case is an ideal vehicle for the resolution of the conflict among the circuits that currently subjects the nation's airlines to an intolerable patchwork of state regulation that is precisely what the ADA was meant to avoid.

1. Respondent does not dispute the essential elements of the circuit split highlighted in the Petition. First, it is undisputed that section 105(a)(1) of the ADA preempts all state laws that have a "significant effect" on airline rates, routes or services. *See Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 388 (1992). Second, respondent does not dispute – because she cannot – that this includes state law tort claims, like the fraud claim held preempted in *Morales*, *id.* at 386 (rejecting any other rule as "utterly irrational"), the intentional tort claims held preempted in *Travel All Over The World, Inc. v. Saudi Arabia*, 73 F.3d 1423, 1434-35 (7th Cir. 1996) and *Smith v. Comair, Inc.*, 134 F.3d 254, 259 (4th Cir. 1998), and the claims of fraudulent inducement and breach

of fiduciary duty held preempted in *United Airlines, Inc. v. Mesa Airlines, Inc.*, 219 F.3d 605, 609-11 (7th Cir. 2000), *petition for cert. filed* (U.S. Oct 2, 2000) (No. 00-496). Third, respondent concedes that there is a pronounced conflict among the circuits over the meaning of the term "service" in section 105(a)(1) of the ADA. *See* Br. in Opp. at 6-7. Finally, respondent does not seriously contest the fact that the Ninth and Third Circuits have effectively read the term "service" out of the statute by defining it in a manner that adds nothing to the terms "price" and "route." *See* Pet. App. 4a-7a; *Charas v. Trans Worlds Airlines, Inc.*, 160 F.3d 1259, 1261, 1266 (9th Cir. 1998) (*en banc*); *Taj Mahal Travel, Inc. v. Delta Airlines, Inc.*, 164 F.3d 186, 194 (3d Cir. 1998).

It follows – and respondent does not deny – that in the Fourth, Fifth, Seventh and Eleventh Circuits, state tort claims concerning airline services such as the provision of food and beverages, carry-on baggage rules, ticketing procedures, and boarding practices are preempted.[1] In the Ninth and Third Circuits, however, where *Charas* and *Duncan* are the rule, the ADA does not ban states from regulating all aspects of such activities because, in those circuits, they are not "services" within the meaning of the ADA.

A recent case out of the Ninth Circuit proves the point. In *Tall Club of Silicon Valley v. American Airlines*, No. C 00-982, 2000 WL 868524 (N.D. Cal. June 19, 2000), an association of persons over 6' 2" tall sought an injunction

[1]*See Smith*, 134 F.3d at 259; *Hodges v. Delta Airlines, Inc.*, 44 F.3d 334 (5th Cir. 1995) (*en banc*); *Travel All Over The World, Inc.*, 73 F.3d at 1434-35; *Parise v. Delta Airlines, Inc.*, 141 F.3d 1463, 1465-66 (11th Cir. 1998).

based on state law directing American Airlines to reserve a certain number of seats with extra leg room on each flight. Applying *Charas*, the *Tall Club* court held that the Ninth Circuit's "narrow definition of service substantially limits the scope of preemption under section 41713 . . . ." *Id.* at *3. Accordingly, the plaintiff's claims were not preempted. *Id.* In other words, because seating requirements would not amount to "utility-style regulation," an airline's seating policies are subject to the full range of state regulation in the Ninth Circuit.[2] *See id.* at *3-*4.

By contrast, there can be no doubt that *Tall Club* would have been decided differently under the competing *Hodges* standard, which does not arbitrarily exclude in-flight amenities from the scope of the "services" protected from state regulation under the ADA. *See Hodges v. Delta Airlines, Inc.*, 44 F.3d 334, 336 (5th Cir. 1995) (*en banc*) ("'Services' generally represent a bargained-for or anticipated provision of labor from one party to another. If the element of bargain or agreement is incorporated in our understanding of services, it leads to a concern with the contractual arrangement between the airline and the use of the service. Elements of the air carrier service bargain

[2]As any taller traveler might agree, an airline's decision to provide extra leg room could give that airline a substantial competitive advantage in the marketplace. Consequently, some air carriers might offer more leg room to compete for this segment of the market. Others might not, however, based on the belief that, as a strategic matter, offering more seats on each flight (necessarily with less leg room) will enable them to offer lower fares and thus increase sales. Under the ADA, these are precisely the kinds of business decisions that were meant to be controlled by market forces, not state regulation. *See Morales*, 504 U.S. at 378 (in enacting the ADA, Congress determined that "'maximum reliance on competitive market forces' would best further 'efficiency, innovation, and low prices' as well as 'variety [and] quality . . . of air transportation services'") (quoting 49 U.S.C. App. § 1302(a)(4), 1302(a)(9)).

include items such as ticketing, boarding procedures, provision of food and drink, and baggage handling.").

2. Faced with this serious conflict among the circuits over the meaning of a law designed to protect airlines from varying state law regulations, respondent's only answer is to say that there is uniformity over the question whether personal injury claims are preempted. But that is a mere sleight of hand: no court has held that whether a claim is preempted under the ADA turns on the type of harm suffered by the plaintiff. Rather, in all circuits, preemption turns on whether the plaintiff's *claim* significantly affects an airline "service," which in turn depends on the breadth of that statutory term. The type of harm suffered is not determinative. No other rule would be consistent with this Court's reasoning in *Morales*, 504 U.S. at 383-89.

It may be true that the large majority of personal injury claims that might be brought against the airlines are not barred by the ADA. But allowing or disallowing smoking, allowing or prohibiting carry-on baggage, and permitting or restricting alcohol consumption are quite different matters from the way in which such services are provided in a particular instance. Claims based on isolated tortious acts of employees, after all, seldom have a significant impact on airline fares, routes or services. But that does not mean that it makes sense to exclude personal injury claims categorically, or that *any* circuit has so ruled.

Indeed, the Ninth Circuit's ruling in this case itself makes clear that the non-preemption ruling was based on the court's interpretation of the term "service":

> Given our holding in *Charas*, it is clear that allowing smoking on Northwest's trans-Pacific flights does not constitute a "service." An airline's decision to permit (or not to permit) smoking on a flight is not a decision dealing with "the frequency and scheduling of transportation, [or] the selection of markets to or from which transportation is provided." *Charas*, 160 F.3d at 1265-66.

Pet. App. 5a-6a. Thus, even though respondent's claim directly challenged a smoking *policy*, it was allowed to go forward because such a policy was held not to involve a "service." The fact that respondent's alleged injuries happened to be physical in nature had nothing to do with this conclusion.[3]

In light of the court's analysis, it is clear that the *Hodges* court's definition of a service would have dictated a different result. *Hodges* adopted a definition of "service" that expressly included "smoking rules." *See Hodges*, 44 F.3d at 336 (adopting the Civil Aeronautics Board's definition of a service). And, unlike the Ninth Circuit, it recognized the distinction between a direct challenge to an airline's *policy* to provide a service and a challenge to the negligent *manner* in which that service might have been

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[3]When the court went on to determine whether a personal injury claim could ever have the forbidden significant effect on a service, it was assuming that smoking was *not* a service and was asking whether a personal injury claim could ever affect *other* services such as the routes the airline is willing to fly. Pet. App. 6a-7a. That inquiry was appropriate only after the court had first held that smoking was not a service and, therefore, that respondent's claims were not directly preempted. *See id.* Moreover, by concluding that a personal injury suit does not have a significant effect on other services – even where it could be shown that it would in fact force the carrier to alter its routes, *see id.*, – the *Duncan* court effectively created a bright-line rule for personal injury cases that is patently at odds with the analysis employed by the Second, Fourth, Fifth, Seventh and Eleventh Circuits.

performed. In the Fifth Circuit (and others), only the latter survives the ADA's broad preemptive force.[4] *See Hodges*, 44 F.3d at 339 (distinguishing between claims challenging an airline's policy to provide a service, which are preempted, and claims challenging the way in which that service is performed, which are not preempted); *Smith*, 134 F.3d at 259-60 (distinguishing between claims challenging an airline's boarding policies, which are preempted, and those challenging "outrageous conduct" in carrying out those policies, which are not preempted).

Indeed, the best indication of the practical impact of the circuit split with respect to the very claim at issue here is the fact that the district court, applying pre-*Charas* Ninth Circuit cases (which expressly followed the *Hodges* court's broad definition of services), had no difficulty concluding that respondent's claims challenging Northwest's smoking policies were preempted. Pet. App. 12a-17a (relying on *Gee v. Southwest Airlines*, 110 F.3d 1400, 1404-07 (9th Cir. 1997), *overruled by Charas*, 160 F.3d at 1266). After *Charas*, of course, the Ninth Circuit reversed on the ground that smoking is not a "service" under the ADA. Pet. App. 5a-6a. The only difference was the operative definition of a "service" – the very conflict that respondent unpersuasively dismisses as not being outcome-determinative here.

3. In sum, contrary to respondent's claims, there is *no* agreement among the circuits over the application of the ADA's preemption clause to a safety-related tort claim, like

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[4]Because garden-variety negligence claims are not always preempted, it is hardly surprising that Congress has required airlines to have insurance to cover personal injury claims. 49 U.S.C. § 41112. Respondent's reliance on this provision as textual evidence that no personal injury claim can ever be preempted is misplaced.

respondent's here, that directly challenges an airline's policy adopted for the purpose of competing in the marketplace. To the contrary, as respondent concedes, there is a direct conflict over the proper interpretation of the word "service" in section 105(a)(1) of the ADA. And respondent has not denied that the different interpretations necessarily would lead to different results in this case. The effect of the Ninth Circuit's rigid and unprincipled rule would be to allow adoption of plenary state laws regulating many aspects of airline operations down to the last detail – as long as they did not affect the prices an airline charges or the routes it flies. That is precisely what the ADA was intended to prevent. This case thus presents this Court with the perfect opportunity to resolve the circuits' interpretive impasse and to restore the uniform deregulation that the ADA was designed to promote.

CONCLUSION

The writ of certiorari should be granted.

Respectfully submitted,

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October 31, 2000

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SUPREME COURT OF THE UNITED STATES

NORTHWEST AIRLINES, INC. *v.* JULIE DUNCAN

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 00–404. Decided December 11, 2000

The petition for a writ of certiorari is denied.

Justice O'Connor, with whom The Chief Justice and Justice Thomas join, dissenting.

The petition for a writ of certiorari in this case presents an important issue that has divided the Courts of Appeals: the meaning of the term "service" in the portion of the Airline Deregulation Act of 1978 (ADA) that pre-empts any state law "related to a price, route, or service of an air carrier." 49 U. S. C. §41713(b)(1). I would grant the petition to resolve this issue and bring needed certainty to this area of the law.

We have addressed the scope of the ADA's pre-emption provision on two prior occasions. In *Morales* v. *Trans World Airlines, Inc.*, 504 U. S. 374, 383 (1992), we noted the "broad pre-emptive purpose" of the ADA. And while we have never directly addressed the definition of "service" within the meaning of §41713(b)(1), we have suggested that this term encompasses "access to flights and class-of-service upgrades." *American Airlines, Inc.* v. *Wolens*, 513 U. S. 219, 226 (1995). The Courts of Appeals, however, have taken directly conflicting positions on this question of statutory interpretation.

The Ninth Circuit below, adhering to its decision in *Charas* v. *TWA*, 160 F. 3d 1259 (1998) (en banc), held that the term "service" encompasses "'the prices, schedules, origins and destinations of the point-to-point transportation of passengers, cargo, or mail,'" but not the "'provision of in-flight beverages, personal assistance to passengers,

the handling of luggage, and similar amenities.'" 208 F. 3d 1112, 1114–1115 (2000) (quoting *Charas, supra,* at 1261). The Third Circuit has expressly agreed with this approach. *Taj Mahal Travel, Inc.* v. *Delta Airlines Inc.*, 164 F. 3d 186, 194 (1998). In contrast, three Courts of Appeals have adopted a much broader definition. See *Hodges* v. *Delta Airlines, Inc.*, 44 F. 3d 334, 336 (CA5 1995) (en banc) (defining "service" in terms of the "'[contractual] features of air transportation,'" including "'ticketing, boarding procedures, provision of food and drink, and baggage handling'"); *Smith* v. *Comair, Inc.*, 134 F. 3d 254, 259 (CA4 1998) ("Undoubtedly, boarding procedures are a service rendered by an airline") (citing *Hodges, supra,* at 336); *Travel All Over The World, Inc.* v. *Kingdom of Saudi Arabia*, 73 F. 3d 1423, 1433 (CA7 1996) (adopting *Hodges* definition). See also *Chukwu* v. *Board of Directors British Airways*, 889 F. Supp. 12, 13 (Mass. 1995), aff'd mem., 101 F. 3d 106 (CA1 1996) (same).

Given these opposing interpretations, I believe we should hear this case. The legal issue is an important one, well suited for resolution by this Court. The two leading cases, *Charas* and *Hodges*, are both the product of en banc consideration. They have fully explored the relevant considerations, including the language and history of the ADA and its pre-emption clause, as well as the policies supporting the possible interpretations of the term "service." Compare *Charas, supra,* at 1262–1266, with *Hodges, supra,* at 336–339.

Resolution of this question would provide needed certainty to airline companies. While this case involves the potential pre-emption of a state law personal-injury claim based on an airline's smoking policy, the legal principle at stake has ramifications for a host of other tort actions against airlines. See, *e.g.*, *Smith, supra* (false imprisonment and intentional infliction of emotional distress); *Travel All Over The World, supra* (defamation). Because

airline companies operate across state lines, the divergent pre-emption rules formulated by the Courts of Appeals currently operate to expose the airlines to inconsistent state regulations. Cf. *Morales, supra,* at 378 (the ADA's pre-emption provision is intended "[t]o ensure that the States would not undo federal deregulation with regulation of their own").

A decision from this Court would provide needed clarification on this discrete and important issue of statutory interpretation. Accordingly, I respectfully dissent from the denial of the petition for certiorari.

occupational taxes on Indian gaming activities." *Id.* at 22a. Rather, that Section "provides that Indian gaming operations, like state gaming operations, must report certain player winnings to the federal government, and must likewise withhold federal taxes if players' winnings exceed a certain level." *Ibid.* The court of appeals further observed that the original version of the bill that became IGRA § 2719(d) had an explicit exemption for Indian gaming from the federal wagering excise tax, but that exemption had been deleted prior to passage. *Id.* at 23a.

The court found unpersuasive petitioners' reliance on a letter from Senator Daniel Inouye to the Commissioner of Internal Revenue, written three years after IGRA was enacted, in which Senator Inouye maintained that "it was the intention of Congress that the tax treatment of wagers conducted by Tribal governments be the same as that for wagers conducted by state governments under Chapter 35 of the Internal Revenue Code." Pet. App. 25a. The court stated that: (1) "the comments of a single senator, made years after the statute at issue was enacted, are of little value in interpreting [IGRA § 2719(d)]"; and (2) in all events, the Senator's interpretation "is inconsistent with both the language and the legislative history of the statute." *Ibid.* The court of appeals concluded:

> Although it is true that [IGRA] § 2719(d)'s reference to Chapter 35 is somewhat cryptic (since Chapter 35 pertains solely to wagering excise taxes and has nothing to do with the reporting and withholding of taxes on wagering winnings), we believe the most reasonable conclusion is that the reference was included in order to incorporate Chapter 35's definitions of the terms "wager" and "lottery." In any event, we are unwilling to assume, based solely upon the inclusion of this parenthetical reference to Chapter 35, that Congress intended to provide tribes with the exemption from federal wagering excise taxes enjoyed by the states. Such an assumption would fly directly in the face of § 2719(d)'s express reference to "the reporting and withholding of taxes with respect to the winnings from gaming or wagering operations." Had Congress intended to provide tribes with an exemption from the federal wagering excise taxes, it clearly knew how to draft such an exemption.

Id. at 25a-26a. The court of appeals subsequently denied petitioners' request for rehearing and for rehearing en banc. *Id.* at 66a-67a.

DISCUSSION

The court of appeals correctly held that IGRA § 2719(d)(1) does not grant Indian Tribes an exemption from the federal wagering taxes imposed by I.R.C. §§ 4401 and 4411. That holding, however, directly conflicts with the Federal Circuit's decision in *Little Six, Inc.* v. *United States*, 210 F.3d 1361, petition for rehearing denied, 229 F.3d 1383 (2000) (three judges dissenting).[1] The taxability of tribal gaming operations is an important federal issue that is likely to recur as the Indian gaming industry continues to expand. Resolution by this Court of the conflict in the circuits on the taxability of tribe-operated lotteries is appropriate to enable the United States to administer the tax laws consistently to all Indian gaming operators. We

[1] A copy of the order denying rehearing en banc, with a dissenting opinion by Judge Dyk, is in App., *infra*, 1a-9a.

therefore agree that the petition for a writ of certiorari should be granted.

1. a. The text, structure, legislative history, and purpose of IGRA § 2719(d) establish that it does not exempt petitioners from federal wagering taxes. Section 2719(d) states that all provisions of the Internal Revenue Code—including (but not limited to) several specified Internal Revenue Code provisions (including Chapter 35)—apply to tribes in the same manner as States *with respect to the reporting and withholding of winnings from gaming and wagering operations*. The court of appeals properly observed that, in context, "the most reasonable conclusion is that the reference [to Chapter 35] was included in order to incorporate Chapter 35's definitions of the terms 'wager' and 'lottery.'" Pet. App. 25a. Because Chapter 35 (in I.R.C. § 4421) provides definitions of "wager" and "lottery," the reference to Chapter 35 insures that all forms of wagers and lotteries falling within those terms are within the scope of the "gaming and wagering operations" from which winnings are to be reported and withheld under IGRA § 2719(d), just as winnings from more traditional, well-known gaming operations would be subject to these reporting and withholding requirements. Properly understood, the reference to Chapter 35, which occurs only in parentheses, thus harmonizes with the overall text of IGRA § 2719(d).

Even apart from the court of appeals' explanation of the parenthetical reference to Chapter 35, the statutory text and structure would not support reading that reference as constituting a conferral of a tax exemption merely because Chapter 35 contains a single provision dealing with exemptions. See I.R.C. § 4402. Nothing in the text of IGRA § 2719(d) suggests that the reference was intended to refer to the exemptions in I.R.C.

§ 4402(3), rather than to other provisions in that Chapter that deal with matters of tax administration akin to reporting and withholding. See I.R.C. § 4403 (requiring a taxpayer to keep record of gross amount of all wagers); I.R.C. § 4412 (registration provision for occupational tax). Further, reading the parenthetical reference to Chapter 35 as a tax exemption would contradict the statute's express limitation to provisions "concerning the reporting and withholding of taxes." See *Little Six*, 229 F.3d at 1385 (Dyk, J., dissenting) ("It is far easier to make sense out of the statute if the inconsistent specific examples are read out of the statute because they conflict with the limitation.").

b. The drafting history also establishes that Congress did not intend for IGRA § 2719(d) to confer on Indian Tribes an exemption from wagering excise taxes. Congress deleted language contained in the originally proposed version of S. 555 (the bill that ultimately was enacted as IGRA), that would have exempted tribes from the wagering excise tax. The Senate Bill, as originally proposed (S. 555, 100th Cong., 1st Sess. (1987)), provided that:

> Provisions of the Internal Revenue Code of 1986, *concerning the taxation and the reporting and withholding of taxes with respect to gambling or wagering operations* shall apply to Indian gaming operations conducted pursuant to this Act the same as they apply to State operations.

S. 555, *supra*, at 37 (emphasis added). That language would have expressly extended to Tribes the same exemptions allowed to States with respect to any and all taxes related to "gambling or wagering." But the version of S. 555, as reported by the Senate Committee, and ultimately enacted, omitted the word "taxation,"

and instead provided that Tribes would be treated as States only for purposes of the Internal Revenue Code provisions dealing with the "reporting and withholding of taxes with respect to the winnings from gaming or wagering operations." 25 U.S.C. 2719(d)(1).

Consistent with the language of IGRA § 2719(d) as enacted, the Senate Report indicates that this provision "applies the Internal Revenue Code to winnings from Indian gaming operations." S. Rep. No. 446, 100th Cong., 2d Sess. 20 (1988). There is no suggestion in that report that the inclusion of the parenthetical language in the revised provision was intended to exempt Tribes from excise taxes otherwise applicable to such operations. The deletion of the express exemption in the original proposal is strong evidence of Congress's intent not to provide such an exemption. See, *e.g.*, *INS* v. *Cardozo-Fonseca*, 480 U.S. 421, 442-443 (1987); *Gulf Oil Corp.* v. *Copp Paving Co.*, 419 U.S. 186, 200 (1974); see also *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145, 157 (1973) (noting tax immunity provisions were dropped from bills preceding enactment of Indian Reorganization Act (25 U.S.C. 461 *et seq.*)). Because petitioners' interpretation of the reference to "Chapter 35" in IGRA § 2719(d) would give effect to a statutory result that Congress explicitly declined to enact when it deleted the language expressly exempting tribes from the wagering tax, the court below was correct to reject it. See *South Carolina* v. *Catawba Indian Tribe*, 476 U.S. 498, 506 (1986).

c. The purposes and policies of IGRA do not evidence congressional intent to create an implicit tax exemption outside of the Internal Revenue Code, and certainly not in a parenthetical reference without any substantive discussion in the legislative history. In *Little Six*, the Federal Circuit erred in concluding that

it should treat Tribes as States for tax exemption purposes in reliance on IGRA's overall goal of fostering tribal economic development and self-sufficiency. Pet. App. 110a-111a. That court read the general policy of IGRA too broadly to create an implied exemption from taxation. See *United States* v. *Anderson*, 625 F.2d 910, 917 (9th Cir. 1980) ("[i]f federal courts were free to create federal tax exemptions for Indians based on policy alone, the federal policy of Indian economic advancement, implicit in almost all of the many federal enactments regarding Indians, would soon have the unintended effect of exempting all Indians from all federal taxation"), cert. denied, 450 U.S. 920 (1981); *Little Six*, 229 F.3d at 1385-1386 (Dyk, J., dissenting) ("[t]he fact that a statute confers a set of benefits on tribes cannot mean that the statute should be extended beyond its terms to grant additional benefits to the tribes").

Congress can, and has, passed legislation that seeks to encourage tribal economic development, while retaining certain aspects of tax liability. In I.R.C. § 7871(a)(2), 26 U.S.C. 7871(a)(2), Congress expressed an intent to promote tribal economic development by granting certain excise tax exemptions enjoyed by States, but extended to Tribes only specific exemptions that involved "the exercise of an essential governmental function." See 26 U.S.C. 7871(b); S. Rep. No. 646, 97th Cong., 2d Sess. 11-13 (1982); Rev. Rul. 94-81, 1994-2 C.B. 412. If Congress had intended to create an excise tax exemption for Tribes, it could easily have done so within two existing statutory frameworks. Section 4402 of the Internal Revenue Code provides explicit wagering excise tax exemptions (but not to Tribes), and I.R.C. § 7871(a), 26 U.S.C. 7871(a), treats Tribes as States for purposes of specified excise tax

exemptions (but not the wagering excise tax). See Rev. Rul. 94-81, *supra*, at 413 ("The taxes imposed under chapter 35 are not included under § 7871(a)(2) and, therefore, Indian tribal governments are not treated as states under § 7871 with respect to wagering taxes.").

2. Petitioner contends that the court below erred in not applying the canon of construction that statutes are to be construed liberally in favor of Indians to recognize an exemption from the federal wagering taxes. That contention is incorrect. It is well settled that "exemptions from taxation are not to be implied; they must be unambiguously proved." *United States* v. *Wells Fargo Bank*, 485 U.S. 351, 354-355 (1988). See also *United States Trust Co.* v. *Helvering*, 307 U.S. 57, 60 (1939). This Court has applied that rule to deny Indians implied exemptions from both federal income taxes, *Superintendent of Five Civilized Tribes* v. *Commissioner*, 295 U.S. 418, 419-420 (1935); *Choteau* v. *Burnet*, 283 U.S. 691, 696-697 (1931), and federal excise taxes, *Cherokee Tobacco*, 78 U.S. (11 Wall.) 616, 620 (1870); see also *Confederated Tribes of the Warm Springs Reservation* v. *Kurtz*, 691 F.2d 878, 883 (9th Cir. 1982), cert. denied, 460 U.S. 1040 (1983). Section 4401(c) of the Internal Revenue Code, 26 U.S.C. 4401(c), imposes a wagering excise tax on "[e]ach person who is engaged in the business of accepting wagers." There is no express language in IGRA § 2719(d) that exempts Tribes from that tax. Indeed, on its face, that Section says nothing about either liability for wagering taxes or exemptions therefrom. Nor is there any indication in the legislative history of an intent to confer such an exemption.

Where a taxing authority of a State or one of its subdivisions seeks to impose a tax on Indians, this Court has regularly applied two related canons of construction

that are "rooted in the unique trust relationship between the United States and the Indians." *County of Oneida* v. *Oneida Indian Nation*, 470 U.S. 226, 247 (1985). "[F]irst, the States may tax Indians only when Congress has manifested clearly its consent to such taxation; second, statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *Montana* v. *Blackfeet Tribe*, 471 U.S. 759, 766 (1985) (citation omitted); see also *Oklahoma Tax Comm'n* v. *Chickasaw Nation*, 515 U.S. 450, 455, 458 (1995).

The situation is much different, however, in federal taxation cases such as this one. Unlike state governments, Congress has plenary authority to legislate over Indian affairs,[2] and such authority unquestionably includes the power to impose federal taxes. See *Choteau*, 283 U.S. at 697. Although this Court has relied on the United States' special relationship with Indians to require that Congress use explicit statutory language when abrogating Indian treaty rights,[3] this Court does not require that Congress use explicit language to extend general federal tax statutes to

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[2] U.S. Const. Art. I, § 8, Cl. 3; Art. II, § 2, Cl. 2; *Montana*, 471 U.S. at 764-765; *County of Oneida*, 470 U.S. at 234; *White Mountain Apache Tribe* v. *Bracker*, 448 U.S. 136, 142 (1980); *Morton* v. *Mancari*, 417 U.S. 535, 551-552 (1974).

[3] See, *e.g.*, *County of Oneida*, 470 U.S. at 247 ("'Absent explicit statutory language,' this Court accordingly has refused to find that Congress has abrogated Indian treaty rights.") (quoting *Washington* v. *Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 690 (1979)); *Solem* v. *Bartlett*, 465 U.S. 463, 470 (1984) (Congress must "clearly evince" an intent to diminish reservation boundaries); *United States* v. *Santa Fe Pacific R.R.*, 314 U.S. 339, 346 (1941) (congressional intent to extinguish Indian land title must be "plain and unambiguous").

Indians. *Superintendent of Five Civilized Tribes*, 295 U.S. at 419-420 (rejecting rule in *Blackbird* v. *Commissioner*, 38 F.2d 976, 977 (10th Cir.), cert. granted, 281 U.S. 714 (1930), that federal income tax laws must manifest a specific intent to apply to Indians). Instead, where a federal tax statute is broad enough to cover the subject matter, any exemption for Indians "must be definitely expressed." *Superintendent of Five Civilized Tribes*, 295 U.S. at 419-420 (quoting *Choteau*, 283 U.S. at 696-697); accord *Squire* v. *Capoeman*, 351 U.S. 1, 6 (1956) ("should be clearly expressed"); *Cherokee Tobacco*, 78 U.S. (11 Wall.) at 620.[4]

3. In addition, courts must insure that application of the canon of construction that ambiguities in federal statutes are to be resolved in favor of Indians does not violate Congress's intent. See, *e.g.*, *South Carolina*, 476 U.S. at 506 & n.16; *DeCoteau* v. *District County Court*, 420 U.S. 425, 447 (1975). Like other canons of statutory construction, the Indian canon should be used to resolve, rather than to create, doubt. This Court regularly consults the structure, history, and purpose of the

[4] Petitioners rely (Pet. 4 n.2, 23) on this Court's statement that "although tax exemptions generally are to be construed narrowly, in 'the Government's dealings with the Indians the rule is exactly the contrary. The construction, instead of being strict, is liberal.'" *Montana* v. *Blackfeet Tribe*, 471 U.S. at 766 n.4 (quoting *Choate* v. *Trapp*, 224 U.S. 665, 675 (1912)). But both *Montana* and *Choate* concerned whether Congress had authorized state taxation of Indians, and, therefore, this Court had no occasion to consider, much less overrule, its prior precedents requiring that, in federal tax cases, Indians must show that a federal statute or treaty expressly exempts them from the tax. Further, in *Choate*, unlike in this case, there was no dispute that an exemption existed on the face of the statute (Curtis Act, 30 Stat. 505); rather, that case concerned whether the exemption conferred a property right protected by the Fifth Amendment. 225 U.S. at 671.

statute to decipher congressional intent, and has refused to apply the Indian canon where it would yield a contrary interpretation. See, *e.g.*, *Hagen* v. *Utah*, 510 U.S. 399, 412-422 (1994); *Cotton Petroleum Corp.* v. *New Mexico*, 490 U.S. 163, 177-178 (1989); *Oregon Dep't of Fish & Wildlife* v. *Klamath Indian Tribe*, 473 U.S. 753, 774 (1985).

By contrast, the Court has concluded in one case that other statutory indicators of congressional intent support an exemption for Indians from a federal tax. See *Squire* v. *Capoeman*, 351 U.S. at 3-10. In that case, the Court analyzed the structure and purposes of the Indian General Allotment Act, a proviso in the 1906 amendment to the Act, legislative history, and a series of "relatively contemporaneous official and unofficial writings" to conclude that Congress intended to exempt certain Indians from a capital gains tax on the sale of timber from a restricted allotment of land (*i.e.*, land allotted to an Indian, but whose fee title was held in trust by the United States for a specified period in which the land was subject to restrictions on alienation and encumbrance). After reiterating the general, if not competing, principles that "exemptions to tax laws should be clearly expressed," and that ambiguities are construed liberally in favor of Indians, this Court found that the "literal language" of a proviso in a 1906 amendment to the Act "evince[d] a congressional intent" that the income would not be taxable until the government removed the restrictions from the land. *Id.* at 6-8. *Squire* reflects this Court's practice of using traditional tools of statutory construction to insure that it reaches a result consistent with congressional intent, as opposed to reflexively resorting to the Indian canon of construction in interpreting federal tax statutes to reach a result contrary to congressional intent. See

Little Six, 229 F.3d at 1384 (Dyk, J., dissenting) (contending that panel had applied the Indian canon too "quickly" in interpreting IGRA § 2719(d)).

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted.

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DECEMBER 2000

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

No. 99-5083

LITTLE SIX, INC. AND SHAKOPEE MDEWAKANTON SIOUX (DAKOTA) COMMUNITY, PLAINTIFFS - APPELLANTS

v.

UNITED STATES, DEFENDANT -APPELLEE

Oct. 12, 2000

ORDER

Circuit Judge DYK, with whom Circuit Judges NEWMAN and PLAGER join, dissents in a separate opinion.

A petition for rehearing en banc having been filed by the Appellee, and a response thereto having been invited by the Court and filed by the Appellants, and the matter having first been referred as a petition for rehearing to the panel that heard the appeal, and thereafter the petition for rehearing en banc and response having been referred to the circuit judges authorized to request a poll whether to rehear the appeal en banc, and a poll having been requested, taken, and failed,

IT IS ORDERED THAT:

(1) The petition for rehearing is denied.

(2) The petition for rehearing en banc is denied.

The mandate of the Court will issue on October 19, 2000.

DYK, Circuit Judge, with whom Circuit Judges NEWMAN and PLAGER join, dissenting from the Order denying the petition for rehearing en banc.

This case raises important questions concerning the use and effect of the "Indian canon" of construction in interpreting a significant federal statute. The panel decision conflicts with a recent decision of the United States Court of Appeals for the Tenth Circuit. *See Chickasaw Nation v. United States*, 208 F.3d 871 (10th Cir. 2000).

The statute at issue here states: "The provisions of the Internal Revenue Code of 1986 (including sections 1441, 3402(q), 6041, and 6050I, and chapter 35 of such Code) concerning the reporting and withholding of taxes with respect to the winnings from gaming or wagering operations shall apply to Indian gaming operations conducted pursuant to this chapter . . . in the same manner as such provisions apply to State gaming and wagering operations." 25 U.S.C. § 2719(d)(1) (West Supp. 2000). The panel held that the parenthetical reference to chapter 35—the chapter of the Internal Revenue Code that imposes a tax on wagers—exempts Indian pull-tab games from taxation. *See Little Six, Inc. v. United States*, 210 F.3d 1361, 1366 (Fed. Cir. 2000). However, this construction cannot be

reconciled with the other language of the statute, which applies only to provisions "concerning the reporting and withholding of taxes with respect to the winnings." Chapter 35 is not such a provision.

As I read the panel opinion, it finds a facial ambiguity in the statute because of the conflict and resorts immediately to the Indian canon to resolve that ambiguity in favor of the tribe. However, in my view, the panel should not have invoked the Indian canon of construction so quickly. Instead, it should have utilized all available tools of statutory construction before declaring the statute ambiguous and resorting to a default rule designed for exceptional cases where, despite the court's best efforts, an ambiguity in the statute remains.

I agree that making sense of 25 U.S.C. § 2719(d) here is not an easy task. Despite the government's efforts, there is no way to reconcile § 2719(d)'s literal limitation to provisions of the Internal Revenue Code "concerning the reporting and withholding of taxes with respect to the winnings from gaming or wagering operations" with its parenthetical reference to chapter 35. I do not find persuasive the government's argument (adopted by the United States Court of Appeals for the Tenth Circuit) that the reference to chapter 35 was designed to incorporate § 4421's definitions of wagers and lotteries. *See Chickasaw Nation*, 208 F.3d at 883; 26 U.S.C. § 4421. For example, chapter 35 itself explicitly states that its definitions of wagers and lotteries apply only "for purposes of [chapter 35]," 26 U.S.C. § 4421, and its definitions are thus irrelevant for purposes of the other sections of the Code referenced by § 2719(d). I thus agree with the panel that confining § 2719(d)(1) to

provisions "concerning the reporting and withholding of taxes" does in fact render the statute's reference to chapter 35 superfluous. *See Little Six, Inc.*, 210 F.3d at 1365.

In my view, we are confronted with a situation in which it is impossible to give effect to all the language of the statute without rendering the statute self-contradictory. However, this does not create an ambiguity in the statute that justifies immediate resort to a canon designed to resolve ambiguities. Rather, a court under such circumstances should examine the statute's structure, purpose, and history in order to produce an interpretation that makes the statute coherent. The choice here is to accept the statute's limitation to provisions "concerning the reporting and withholding of taxes with respect to . . . winnings," thereby rendering *superfluous* the parenthetical reference to chapter 35, or to accept that the reference to chapter 35 exempts Indian gaming from taxation, thereby *contradicting* the statute's limitation to provisions "concerning the reporting and withholding of taxes with respect to . . . winnings."

While the general rule is that meaning should be afforded to all language in a statute, statutory language inadvertently included can be disregarded if it is found to be contrary to legislative intent. *See United States v. Colon-Ortiz*, 866 F.2d 6, 10 (1st Cir. 1989); *American Radio Relay League, Inc. v. FCC*, 617 F.2d 875, 879 (D.C. Cir. 1980); 2A Norman J. Singer, *Statutes and Statutory Construction* § 46.06, pp. 192-93 (6th ed. 2000) (stating that "words and clauses which are present in a statute only through inadvertence can be disregarded if they are repugnant to what is found, on the basis of

other indicia, to be the legislative intent"). Furthermore, the rule against superfluity has limited force when the alternative is to create even greater problems. In *Church of Scientology v. IRS*, 792 F.2d 153, 163 (D.C. Cir. 1986) (en banc), *aff'd* 484 U.S. 9, 108 S. Ct. 271, 98 L. Ed.2d 228 (1987), Judge (now Justice) Scalia noted that the court's interpretation of the Haskel Amendment, which caused two statutory provisions to become superfluous, was "nothing beside the textual and policy absurdities produced" by a contrary interpretation. That situation seems similar to the case here.

First, I cannot see how an erroneous parenthetical reference to a supposed example can trump the clear limiting language adjacent to the parenthetical. Moreover, as the government points out, it is unlikely that Congress would create a significant tax exemption through a parenthetical reference, and it seems exceedingly unlikely that Congress would do so in a sentence which by its terms is restricted to reporting and withholding of taxes on winnings.

Second, a court should adopt a construction of the statute that makes it coherent. The panel's interpretation of the statute here may resolve this particular case, but it leaves the interpretation of the limitation ("provisions . . . concerning the reporting and withholding of taxes with respect to . . . winnings") unresolved. Is the effect of the panel decision somehow to modify the limitation to make it consistent with the specific examples? If so, what does the limitation now mean? Or does the panel's opinion eliminate the limitation because it is inconsistent with the specific examples? If so, not only would the panel be rendering

the limitation superfluous, but also it would have the effect of making all provisions of the Internal Revenue Code "apply to Indian gaming operations . . . in the same manner as such provisions apply to State gaming and wagering operations." There is no claim that Congress intended this result. It is far easier to make sense out of the statute if the inconsistent specific examples are read out of the statute because they conflict with the limitation.

Third, the legislative history does not support the result rendered by the panel. Early versions of the bill that ultimately became the Indian Gaming Regulatory Act ("IGRA") (of which § 2719(d) is a part) would have exempted tribes from the wagering tax. H.R. 1920, passed by the House in 1986, provided: "Provisions of the Internal Revenue Code of 1954, as amended, concerning the *taxation* and the reporting and withholding of taxes pursuant to the operation of a gambling or wagering operation shall apply to the operations in accord with the Indian Gaming Regulatory Act the same as they apply to State operations." H.R. 1920, 99th Cong. § 4 (1986) (emphasis added). The accompanying House report explicitly linked chapter 35 with the bill's reference to taxation. It noted that "Section 4 provides that relevant provisions of the Internal Revenue Code, such as section 3402(q) and chapter 35, 26 U.S.C., concerning taxation and the reporting and withholding of taxes relating to the operation of gaming activities shall apply to tribal gaming activities as they apply to State operated gaming activities." H.R. Rep. No. 99-488, at 13 (1986).

The Senate bill as originally proposed continued to include the reference to "taxation." S. 555, 100th Cong.

§ 20(D) (Feb. 19, 1987). However, in the version of the bill reported out of Committee and ultimately enacted, the reference to "taxation" was removed. The fact that the committee at the same time added a parenthetical including examples of both "reporting and withholding" provisions and "taxation" provisions hardly evidences a decision to have the specific taxation examples substitute for the general "taxation" exclusion. If the specific examples were a substitute for the general exclusions, how can the retention of the "reporting and withholding" language be explained? The legislative history here provides no clear guidance. The language of the provision has all the earmarks of a simple mistake in legislative drafting. The better explanation for the reference to chapter 35 is therefore that it was included inadvertently after Congress had decided to eliminate the reference to "taxation."

Fourth, I disagree with the panel's analysis of the purpose of § 2719(d). The panel seeks further support from the stated purposes of the IGRA, noting that the IGRA was intended "to promote tribal economic development and self-sufficiency." *Little Six, Inc.*, 210 F.3d at 1366; 25 U.S.C. § 2702. This policy strikes me as too open-ended to support the result here. The fact that a statute confers a set of benefits on tribes cannot mean that the statute should be extended beyond its terms to grant additional benefits to the tribes.

I find that the statute's structure, purpose, and history all support the conclusion that the statute's reference to chapter 35 is superfluous. Thus, I think the panel here places more weight on the canon of construction regarding resolving ambiguities in favor of the Native Americans than that canon can bear. The

Supreme Court has stated that the canon is not a license to adopt a "contorted construction" of a statute. *South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498, 506, 106 S. Ct. 2039, 90 L. Ed.2d 490 (1986) (citing various cases noting that the canon is not license to disregard congressional intent). Nor can the canon properly be invoked to avoid the traditional analysis required for statutory construction. For example, in *Hagen* v. *Utah*, 510 U.S. 399, 114 S. Ct. 958, 127 L.Ed. 2d 252 (1994), the Supreme Court analyzed whether Congress had diminished a reservation. Although the Court recognized that it must "resolve any ambiguities in favor of the Indians," *id.* at 411, 114 S. Ct. 958, it did not shrink from applying the usual tools of statutory construction: the Court considered the language of the relevant Acts, their legislative history, contemporary historical evidence, and the Court's past precedents. *See id.* at 412-21, 114 S. Ct. 958. Despite the existence of the Indian canon, the Court concluded that the evidence demonstrated that the reservation had in fact been diminished by Congress, a result which led the dissent to complain that the Court was purporting to apply the Indian canon but "ignores [it] in practice." *Hagen*, 510 U.S. at 424, 114 S. Ct. 958 (Blackmun, J., dissenting). The panel's approach here appears to be inconsistent with the Supreme Court's approach in *Hagen*.

To be sure, fairness to our Native American population has been a quality in very short supply during much of our history. But we have not been assigned the task of redressing past wrongs by expanding the scope of federal statutes.

For the above stated reasons, I respectfully dissent from this Court's refusal to grant the United States' petition for rehearing en banc.

Supreme Court, U.S.
FILED
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No. 00-507

IN THE

Supreme Court of the United States

THE CHICKASAW NATION and
THE CHOCTAW NATION OF OKLAHOMA,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF ON THE MERITS FOR PETITIONERS

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QUESTION PRESENTED

Whether, under the applicable Indian-law canons of statutory construction, the Indian Gaming Regulatory Act, by 25 U.S.C. § 2719(d)(1)'s express incorporation of Chapter 35 of the Internal Revenue Code, confers on Indian tribes conducting gaming operations the same exemption from wagering taxes afforded to states by Chapter 35 of the Internal Revenue Code?

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Chickasaw Nation v. United States, 208 F.3d 871 (10th Cir. 2000), Appendix to Petition for Certiorari ("App."), p. 1a.

Choctaw Nation of Oklahoma v. United States, 210 F.3d 389 (10th Cir. 2000), App. p. 29a.

Choctaw Nation of Oklahoma v. United States, 1999 WL 282779 (E.D. Okla. 1999), App. p. 33a.

Chickasaw Nation v. United States, 1998 WL 975690 (E.D. Okla. 1998), App. p. 47a.

STATEMENT OF THE BASIS OF JURISDICTION IN THIS COURT

The judgments for which review is sought were entered on April 5, 2000. The petitions for rehearing and suggestions for rehearing *en banc* were denied on July 5, 2000. (App. p. 66a.) The Petition was filed on October 2, 2000 within the time allowed by law. 28 U.S.C. § 2101(c); Supreme Court Rule 13.3. Jurisdiction is based on 28 U.S.C. § 1254(1).

CITATION TO STATUTES INVOLVED IN THE CASE

25 U.S.C. § 2701 (1994)
25 U.S.C. § 2702 (1994)
25 U.S.C. § 2710 (1994)
25 U.S.C. § 2719(d)(1) (1994)
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(Statutory text set out in App. p. 68a, *et seq.*)

STATEMENT OF THE CASE

The Chickasaw Nation and the Choctaw Nation of Oklahoma [the "Nations"], sovereign, federally-recognized Indian Tribes, separately conduct pull-tab games pursuant to the Indian Gaming Regulatory Act, Pub. L. No. 100-497, 102 Stat. 2485 (1988) (codified at 25 U.S.C. § 2701, *et seq.*) ["IGRA"], and their own respective tribal ordinances. Those games are conducted exclusively on trust lands at facilities operated by the respective Nations. As required by 25 U.S.C. § 2710(b)(2)(B), the tribal revenues from those operations are used exclusively for the respective Nations' governmental functions, consisting of legislative branch expenses, judicial branch expenses and executive branch expenses, including tribal nutritional, medical, educational and senior citizen programs. No tribal member of either Nation owns an interest in the particular Nation's gaming operations or is entitled to receive direct payment from the net revenues of those operations.

The Internal Revenue Service assessed federal wagering and related occupational taxes pursuant to Internal Revenue Code ["IRC"] Chapter 35, 26 U.S.C. §§ 4401 and 4411 (1994), against the Nations in connection with their pull-tab operations.

After satisfying the administrative prerequisites for a refund action, each Nation filed its separate action against the United States [the "Government"] for a refund pursuant to 28 U.S.C. § 1346(a)(1) (1994) in the United States District Court for the Eastern District of Oklahoma, seeking recovery of the wagering taxes paid for the month of July 1993, plus interest; occupational taxes for the year 1993, plus interest; and reasonable litigation costs authorized by 26 U.S.C. § 7430(a) (1994). Each Nation alleged that the taxes were erroneously and illegally assessed and collected. The Government denied in each case that the taxes in question were erroneously and illegally assessed and collected. In each case, the Government also counterclaimed for unpaid wagering and occupational tax

assessments, plus interest for periods additional to those addressed in the complaints. The Nations denied liability and alleged that the taxes assessed were illegal as applied to them.

The merits in each case were addressed by cross motions for summary judgment. In each action, the district court then entered judgment against the particular Nation and in favor of the Government.

The Nations separately appealed to the United States Court of Appeals for the Tenth Circuit.

The Tenth Circuit affirmed the district court's judgments. The court of appeals addressed the question of whether the reference to IRC Chapter 35 in 25 U.S.C. § 2719(d) provides to tribes the same federal gaming tax exemption afforded by IRC Chapter 35 to state governmental gaming.[1] The Tenth

1. Section 20(d)(1) of the Indian Gaming Regulatory Act, 102 Stat. 2486 (1998) (codified at 25 U.S.C. § 2719(d)(1)), provides:

> **(d) Application of Internal Revenue Code of 1986**
>
> (1) The provisions of the Internal Revenue Code of 1986 (including sections 1441, 3402(q), 6041, and 6050I, and chapter 35 of such Code) concerning the reporting and withholding of taxes with respect to the winnings from gaming or wagering operations shall apply to Indian gaming operations conducted pursuant to this chapter, or under a Tribal-State compact entered into under section 2710(d)(3) of this title that is in effect, in the same manner as such provisions apply to State and wagering operations.
>
> * * *

IRC Chapter 35 contains 26 U.S.C. § 4402(3) (1994), which provides:

> **§ 4402. Exemptions.**
>
> No tax shall be imposed by this subchapter
>
> **(3) State-conducted lotteries, etc.**
>
> On any wager placed in a sweepstakes, wagering pool, or lottery which is conducted by an agency of a State acting under authority of State law, but only if such wager is placed with the State agency conducting such sweepstakes, wagering pool, or lottery, or with its authorized employees or agents.

Circuit characterized the relevant provision of § 2719(d)(1) as "cryptic;" did not apply any test for determining the existence of an ambiguity; implicitly (if not expressly) recognized an ambiguity; neither invoked nor applied the relevant Indian-law canon of construction (requiring statutory ambiguity to be liberally interpreted to the Indians' benefit) to § 2719(d)(1); construed the provision against the tribal interests; and stated in its Opinion in the *Chickasaw* appeal[2]:

> Although it is true that § 2719(d)'s reference to Chapter 35 is somewhat cryptic (since Chapter 35 pertains solely to wagering excise taxes and has nothing to do with the reporting and withholding of taxes on wagering winnings), we believe the most reasonable conclusion is that the reference was included in order to incorporate Chapter 35's definition of the terms "wager" and "lottery." In any event, we are unwilling to assume, based solely upon the inclusion of this parenthetical reference to Chapter 35, that Congress intended to provide tribes with the exemption from federal wagering excise taxes enjoyed by the states. Such an assumption would fly directly in the face of § 2719(d)'s express reference to "the reporting and withholding of taxes with respect to the winnings from gaming or wagering operations." Had Congress intended to provide tribes with an exemption from the federal wagering excise taxes, it clearly knew how to draft such an exemption.

Chickasaw, 208 F.3d at 883-84.

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2. In the *Choctaw* appeal, rather than issuing an opinion, the Court of Appeals issued a four-page Order and Judgment that adopted by reference the Opinion in the companion *Chickasaw* case and affirmed the District Court judgment in favor of the Government. *See Choctaw Nation of Oklahoma v. United States*, 210 F.3d 389 (10th Cir. 2000).

Nineteen days after *Chickasaw* was handed down, the United States Court of Appeals for the Federal Circuit issued its Opinion in *Little Six, Inc. v. United States*, 210 F.3d 1361 (Fed. Cir. 2000) (App. p. 101a.). That case, an appeal from cross motions for summary judgment that were resolved in favor of the Government, presented the same 25 U.S.C. § 2719(d)(1) tribal government wagering-tax-exemption issue addressed in *Chickasaw*. In *Little Six*, the Federal Circuit began its analysis with the language of IGRA, and explained:

> We agree with Little Six that, although wagers placed on Indian pull-tab games are subject to taxation under I.R.C. §§ 4401 and 4411, Indian tribes are nevertheless exempt from such taxes under 25 U.S.C. § 2719(d)(1). Again, we begin with the language of the relevant statutes. Section 2719(d)(1) provides in relevant part that:
>
> > The provisions of the Internal Revenue Code of 1986 (including sections 1441, 3402(q), 6041, 6050I, *and chapter 35 of such Code)* concerning the reporting and withholding of taxes with respect to the winnings from gaming or wagering operations *shall apply to Indian gaming operations* conducted pursuant to this chapter . . . *in the same manner as such provisions apply to state gaming and wagering operations.*
>
> 25 U.S.C. § 2719(d)(1) (emphasis added). Thus, chapter 35 of the Internal Revenue Code applies to Indian gaming in the same manner as it does to state gaming. Section 4402(3), which is found in chapter 35 of the Internal Revenue Code, provides an express exemption for "any wager placed in a sweepstakes, wagering pool or lottery which is conducted by an agency of a State acting under the authority of State

> law." I.R.C. § 4403(3). Accordingly, section 2719(d)(1) can reasonably be construed as providing a tax exemption for wagers placed on lotteries and pull-tab games conducted by Indian tribes, because chapter 35 of the Internal Revenue Code provides such an exemption to state gaming operations.

Little Six, 210 F.3d at 1365. Aware of the Tenth Circuit's *Chickasaw* Opinion three weeks earlier, the Federal Circuit in *Little Six* rejected its reasoning:

> The government argues that Little Six is not exempt from wagering taxes, because section 2719(d)(1) only applies to those tax provisions that concern "the reporting and withholding of taxes [from] winnings." 25 U.S.C. § 2719(d)(1). However, in construing a statute we must give effect and meaning to all of its terms if possible. *See Bailey v. United States*, 516 U.S. 137, 145 . . . (1955). While section 2719(d)(1) does contain the language cited by the government, it also explicitly refers to section 6050I and chapter 35 of the Internal Revenue Code, which clearly do not relate to "winnings." *See* I.R.C. § 6050I (returns relating to cash received in trade or business); I.R.C. §§ 4401-4405 (chapter 35) (taxes on wagering). Thus, the interpretation proposed by the government would render language in the statute superfluous, a result that we must attempt to avoid.

Id.

The Federal Circuit applied an "inconsistency between portions of the same statute" test for the existence of an ambiguity and found the particular provision, labeled by the Tenth Circuit as "cryptic," to be an ambiguity that, under this Court's controlling precedent, must be resolved in favor of the tribal interests:

> In view of the inconsistency between the statute's reference to winnings and its reference to § 6050I and chapter 35 of the Internal Revenue Code, we conclude that the language in § 2719(d)(1) is ambiguous. Little Six argues that, to the extent the statute is ambiguous, the Indian canon of construction requires section 2719(d)(1) to be construed in their favor. We agree. As stated by the Supreme Court, "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit," *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 . . . (1985).

Id. at 1365.

The Federal Circuit ended that portion of its Opinion with a footnote directly criticizing the *Chickasaw* Opinion giving rise to the judgments that Petitioners seek to have reversed here:

> We note that the Tenth Circuit has recently held that 25 U.S.C. § 2719(d) does not provide tribes with the same exemption from federal wagering excise taxes enjoyed by the states. *See Chickasaw Nation v. United States*, 208 F.3d 871 (10th Cir. 2000). We do not agree. The Tenth Circuit did not discuss the Indian canon of construction, which we believe fully applies here.

Little Six, 210 F.3d at 1365 n.2.

The *Little Six* Court concluded its statutory examination with language that contradicts the Tenth Circuit's reasoning that "[h]ad Congress intended to provide tribes with an exemption from the federal wagering excise taxes, it clearly knew how to draft such an exemption." *Chickasaw*, 208 F.3d at 884. The Federal Circuit explained:

> In the present case, having determined that the language of section 2719(d)(1) is ambiguous and can reasonably be construed as exempting Indian pull-tab games from the taxes at issue, we conclude

> that *Cook* [*v. United States*, 86 F.3d 1095, 1097 (Fed. Cir. 1996)] is inapposite. Moreover, the Supreme Court has held that, "although tax exemptions generally are to be construed narrowly, in 'the Government's dealing with Indians the rule is exactly the contrary. The construction, instead of being strict, is liberal.' " *Montana* [*v. Blackfeet Tribe*,] 471 U.S. [759,] at 766, n.4 [(1985)] . . . (citing *Choate v. Trapp*, 224 U.S. 665, 675 . . . (1912)). We therefore conclude that section 2719(d)(1) should be construed in favor of Little Six. The Court of Federal Claims erred in granting the government's motion for summary judgment and abused its discretion in denying Little Six's motion for summary judgment.

Little Six, 210 F.3d at 1366.

Subsequent to the *Little Six* decision, the Petitioner Nations here sought rehearing, suggested rehearing *en banc*, and called to the Tenth Circuit's attention the express Federal Circuit criticism in *Little Six* of the Tenth Circuit panel's reasoning in *Chickasaw*. After ordering a response brief from the Government, the Tenth Circuit denied rehearing without comment.[3]

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3. After denial of the petition for rehearing by the Tenth Circuit, the rehearing *en banc* sought by the Government in *Little Six* was denied, with three judges dissenting from that denial. *Little Six, Inc. v. United States*, 229 F.3d 1383 (Fed. Cir. 2000). That dissent suggested relegating the Indian-law canon to the back of the line of tools of construction:

> However, in my view, the panel should not have invoked the Indian-law canon of construction so quickly. Instead, it should have utilized all available tools of statutory construction before declaring the statute ambiguous and resorting to a default rule designed for exceptional cases where, despite the court's best efforts, an ambiguity in the statute remains.

Id. at 1384 (Dyk, J., dissenting).

(Cont'd)

The Petitioner Nations sought a Writ of Certiorari to the Court of Appeals for the Tenth Circuit to resolve the conflict between two United States Courts of Appeals on the important matter of whether 25 U.S.C. § 2719(d)(1)'s express incorporation of Chapter 35 of the IRC confers on Indian tribes the same exemption from wagering taxes afforded to states by that chapter. The Respondent acquiesced in the Petition for Certiorari and urged this Court to grant the Petition. Brief for Respondent United States of America, Dec. 26, 2000, at p. 6. On January 22, 2001, this Court granted the Petition.

SUMMARY OF THE ARGUMENT

This Court uses a long-held principle deeply rooted in jurisprudence to resolve textual ambiguities in Indian-law statutes. Between two possible constructions, this Court chooses the liberal construction that benefits the interests of the Indians. Since the trust relationship between the United States and the Indian tribes on which the Indian-law canons are grounded has

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(Cont'd)

Nevertheless, that dissent agreed with the majority in rejecting the Government's argument (embraced by the Tenth Circuit) that the reference to Chapter 35 was designed to incorporate the definitions in 26 U.S.C. § 4421 (1994) of wagers and lotteries:

> I do not find persuasive the government's argument (adopted by the United States Court of Appeals for the Tenth Circuit) that the reference to chapter 35 was designed to incorporate § 4421's definitions of wagers and lotteries. *See Chickasaw Nation*, 208 F.3d at 883; 26 U.S.C. § 4421. For example, chapter 35 itself explicitly states that its definitions of wagers and lotteries apply only "for purposes of [chapter 35]," 26 U.S.C. § 4421, and its definitions are thus irrelevant for purposes of the other sections of the Code referenced by § 2719(d).

Id. (Dyk, J., dissenting).

The dissent refused to apply the Indian-law canon and concluded that the express reference to Chapter 35 should be read out of § 2719(d)(1) as superfluous. *Id.* at 1386. (Dyk, J., dissenting).

not changed, the Indian-law canons remain eminently sound and vital. In particular, this Court has applied the Indian-law canons to resolve statutory ambiguities concerning claimed exemptions from both direct federal taxation and the federal authorization of state taxes without distinction. That application has occurred in the face of the general maxim that tax exemptions are to be strictly construed.

In no case involving the construction of an actual statutory ambiguity, on the basis of which Indians have asserted a tax exemption, has this Court held that the general tax-exemption maxim supersedes the Indian-law canons of construction and results in a narrow construction against the Indians. The Indian tax-exemption cases in which this Court has, in *dicta*, referenced the general tax-exemption maxim neither included textual ambiguity, actually resulted in construction, nor even mentioned the Indian canons. Rather, those cases stand as support for the general proposition that tax exemptions are not to be implied from pure policy untethered to statutory text.

25 U.S.C. § 2719(d)(1) contains an ambiguity as to whether tribal governmental gaming enjoys the same exemption from federal wagering taxes as is provided to state governmental gaming operators by IRC Chapter 35. Section 2719(d)(1), as finally enacted, includes an express reference to IRC Chapter 35, albeit in a phrase of § 2719(d)(1) concerning the reporting and withholding of third-party winnings. Chapter 35, however, has nothing to do with the reporting or withholding of taxes with respect to winnings by third parties. All appellate judges who have addressed § 2719(d)(1), regardless of their ultimate view on the availability of the tax exemption to Indian tribes engaged in governmental gaming, have either expressly or implicitly acknowledged the facial ambiguity of the statute.

The legislative history does not clearly indicate that Congress intended for tribal governmental gaming to be treated differently than state governmental gaming. S. 555, § 20(d),100th Cong. (Feb. 19, 1987), which ultimately became IGRA,

did initially make clear that the IRC provisions concerning taxation (and implicitly, tax exemptions) applicable to state governmental gaming would apply to tribal government gaming. Although the phrase including "taxation" was deleted from S. 555, it was not replaced with silence. Rather, the general "taxation" phrase was contemporaneously replaced by language that included the specific reference to the exemption-granting IRC Chapter 35. The Senate Committee Report and the congressional floor debate are silent as to the reason for that specific substitution. This is not a case of simple deletion, in which congressional intent might be rather strongly inferred from subsequent silence.

Application of the Indian-law canons of construction should result in a liberal construction of the facial statutory ambiguity in § 2719(d)(1) in favor of the tax exemption. Failure to so construe the *patent* ambiguity in that provision would: (a) violate congressional intent that the Indian-law canon on statutory ambiguity apply to IGRA; (b) constitute the practical demise of that eminently sound and vital canon by destroying its long-held primacy and relegating it to the back of the line of tools of construction; and (c) constitute fundamental federal Indian policy adverse to Indian tribes without clear, supporting congressional direction.

Application of the Indian-law canons and the resulting construction in favor of the equality of federal tax treatment of tribal gaming with state gaming will further the federal Indian policy embodied in IGRA of advancing tribal governmental gaming to provide governmental revenue for tribal members' services. Such a construction is inconsistent neither with any clear language in § 2719(d)(1) (or for that matter, any other IGRA provision), nor with any clear legislative history concerning that statute. That construction advances the federal Indian policy of using governmental gaming to raise tribal revenue for member services, thereby helping to break the debilitating cycle of tribal dependency on congressional appropriations.

Application of the Indian-law canons also results in a construction consistent with the legislative indication (from the Senate Committee Report) that tribal governmental gaming to raise revenue for governmental purposes is the same type of activity as governmental gaming conducted by state competitors of tribes. Construction in favor of the exemption places tribal governmental gaming on the same tax footing as state governmental gaming.

A construction of the textual ambiguity in favor of the availability to tribes of the state wagering tax exemption is also consistent with the views of IGRA's primary author, Senator Daniel Inouye, whose views (at a minimum) demonstrate that the pro-tribal construction is clearly a "possible construction" of the ambiguity. Petitioner Nations therefore urge this Court to adopt their proffered construction of § 2719(d)(1) as the necessary resolution of the statutory ambiguity under the Indian-law canons of construction.

ARGUMENT

PROPOSITION ONE

EVEN IN CASES IN WHICH A FEDERAL TAX EXEMPTION IS IN ISSUE, THE INDIAN-LAW CANONS OF CONSTRUCTION MANDATE CONSTRUCTION OF TEXTUALLY-AMBIGUOUS INDIAN-LAW-RELATED FEDERAL STATUTES BROADLY IN THE MANNER MOST FAVORABLE TO TRIBAL INTERESTS, ABSENT CLEAR LEGISLATIVE HISTORY SUPPORTING A CONTRARY CONCLUSION.

A. AN AMBIGUITY IN AN INDIAN-LAW- RELATED FEDERAL STATUTE IS TO BE LIBERALLY CONSTRUED IN FAVOR OF TRIBAL INTERESTS.

This Court has clearly articulated the method for resolving ambiguity in federal statutes affecting Indians:

> When we are faced with these **two possible constructions,** our choice between them must be dictated by a principle deeply rooted in this Court's Indian jurisprudence: "[S]tatutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *Montana v. Blackfeet Tribe*, 471 U.S., at 766 . . . *See also McClanahan v. Arizona State Tax Comm'n*, 411 U.S. [164], at 174 [(1973)].

County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation, 502 U.S. 251, 269 (1992) (emphasis added).

The Indian-law canons reflect a specific, historically-based judicial perspective:

> This rule is not simply a method of breaking ties; it reflects an altogether proper reluctance by the judiciary to assume that Congress has chosen further to disadvantage a people whom our Nation long ago reduced to a state of dependency. The rule is particularly appropriate when the statute in question was passed primarily for the benefit of the Indians. . . .

South Carolina v. Catawba Indian Tribe, 476 U.S. 498, 520 (1986) (Blackmun, J., dissenting).

Fundamental policy based on the relation of the United States to Indian tribes undergirds the Indian-law canons of statutory construction:

> The canons of construction applicable in Indian law are rooted in the unique trust relationship between the United States and the Indians.

County of Oneida v. Oneida Indian Nation, 470 U.S. 226, 247 (1985).

That unique trust relationship between the United States and the Petitioner Nations here has not been abrogated. The Indian-law canons based upon that trust relationship

therefore remain "eminently sound and vital," *Bryan v. Itasca County*, 426 U.S. 373, 392 (1976).

B. THE LEGISLATIVE HISTORY OF IGRA COUNSELS THAT THE INDIAN-LAW CANONS OF CONSTRUCTION ARE TO BE USED TO RESOLVE AMBIGUITIES IN THAT ACT.

When it enacted IGRA, Congress not merely presumptively,[4] but actually knew of this Court's longstanding Indian-law canons of construction. The Senate Select Committee on Indian Affairs expressly stated its desire that those canons be applied to resolve in favor of Indian tribes various ambiguities in IGRA arising in suits over compact negotiations:

> The Committee recognizes that this may include issues of a very general nature and, and [sic] course trusts that courts will interpret any ambiguities on these issues in a manner that will be most favorable to tribal interests consistent with the legal standard used by courts for 150 years in deciding cases involving Indian tribes.

S. Rep. No. 100-446, at 15 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071, 3085. Having both demonstrated certain knowledge of this Court's Indian-law canons and expressed a preference for their application to ambiguities in IGRA concerning compact negotiations, it is inconceivable that Congress did not also intend for the Indian-law canons to apply to IGRA *in toto*.

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4. *See generally McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479, 496 (1991) ("It is presumable that Congress legislates with knowledge of our basic rules of statutory construction. . . .").

C. IN CONSTRUING IN FAVOR OF INDIAN INTERESTS AMBIGUOUS FEDERAL STATUTES AFFECTING TAX EXEMPTIONS, THIS COURT HAS AFFORDED THE INDIAN-LAW CANONS PRECEDENCE OVER THE GENERAL TAX-EXEMPTION MAXIM.

In *Choate v. Trapp*, 224 U.S. 665 (1912), a case involving a tax exemption claimed by Indians, this Court was confronted by the general tax-exemption maxim that tax exemptions should be strictly construed.[5] This Court noted that in the Government's dealing with Indians, because of the special relationship, the general tax-exemption maxim

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5. Only a few years before *Choate*, this Court explained the relatively weak office of the general tax-exemption maxim and indicated that its true effectiveness is as a last, rather than a first, resort:

> *We recognize the force and salutory character of the rule, but it must not be misunderstood. It is not a substitute for all other rules.* It does not mean that whenever a controversy is or can be raised of the meaning of a statute, ambiguity occurs, which immediately and inevitably determines the interpretation of the statute. The decisive simplicity of such effect is very striking. It conveniently removes all difficulties from judgment in many cases of controverted construction of laws. But we cannot concede such effect to the rule, nor is such effect necessary in order to make the rule useful and, at times, decisive. *Its proper office is to help solve ambiguities, not to compel an immediate surrender to them – to be an element in decision, and effective, maybe, when all other tests of meaning have been employed which experience has afforded, and which it is the duty of courts to consider when rights are claimed under a statute.*

Citizens Bank v. Parker, 192 U.S. 73, 85-86 (1904) (emphasis added).

does not apply and the construction is to be liberal in favor of the Indians. *Id.* at 675. This Court then explained:

> This rule of construction has been recognized, without exception for more than a hundred years, and has been applied in tax cases.

Id.

This Court has recognized *Choate's* teaching – that the specific Indian-law statutory-ambiguity canon supersedes the general tax-exemption maxim – in a number of cases involving federal legislation. Most recently, in *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759 (1985), this Court resolved in favor of the Indian tribe the question of whether a state may tax the tribe's royalty interests for leases issued to non-Indian lessees pursuant to the Indian Mineral Leasing Act of 1938, ch. 198, 52 Stat. 347, 25 U.S.C. § 396(a) *et seq.* [the 1938 Act]. The Act of May 29, 1924, ch. 210, 43 Stat. 242, 25 U.S.C. § 398 *et seq.* [the 1924 Act] authorized mineral leasing of unallotted lands, and state taxation of the oil and gas production. The 1938 Act, which permitted the mineral leasing of unallotted lands and detailed uniform leasing procedures designed to protect the Indians, did not contain a provision authorizing state taxation, nor did it specifically repeal the tax authorization of the 1924 Act. Rather, the 1938 Act contained a general repealer provision stating that "[a]ll Act [sic] or parts of Acts inconsistent herewith are hereby repealed." 471 U.S. at 764.

In determining the question by statutory construction in favor of the tribe, this Court observed that the state failed to appreciate that the standard principles of statutory construction do not have their usual force in cases involving Indian law. *See id.* at 766. After explaining the reason for the Indian canons, identifying an Indian-law canon specifically applicable to federal-authorization-of-state-taxation issues (not applicable in this case), and setting forth

the canon that "statutes should be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit," *id.*, this Court then noted:

> Indeed, the Court has held that although tax exemptions generally are to be construed narrowly, "in the Government's dealing with Indians the rule is exactly the contrary. The construction, instead of being strict, is liberal . . ." *Choate v. Trapp*, 224 U.S., at 675.

Blackfeet Tribe, 471 U.S. at 766 n.4.

Although this Court used an Indian-law canon specifically applicable to the federal-authorization-of-state-taxation issue to justify in part its decision in *Blackfeet Tribe*,[6] it also made clear that the Indian canon requiring that statutory ambiguity be construed in favor of tribal interests provided grounds to reject the state's claim that no tax exemption existed:

> The clause surely does not satisfy the requirement that Congress clearly consent to state taxation. **Nor would the state's interpretation satisfy the rule requiring that statutes be construed liberally in favor of the Indians.**

Blackfeet Tribe, 471 U.S. at 767 (emphasis added).

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6. Two such canons are directly applicable in this case: First, the States may tax Indians only when Congress has manifested clearly its consent to such taxation, *e.g.*, *Bryan v. Itasca County*, *supra*, 426 U.S. at 393; second, statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit, *e.g.*, *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 174 (1973); *Choate v. Trapp*, 224 U.S. 665, 675 (1912).

Blackfeet Tribe, 471 U.S. at 766 (emphasis added).

This Court's decision in *Squire v. Capoeman*, 351 U.S. 1 (1956), is particularly germane to the application of the Indian-law canons herein, since that case also dealt with an asserted federal-statute-based immunity from *federal* taxation. In *Squire*, this Court found statutory ambiguity, resolved it in favor of Indians and consequently recognized an exemption from direct federal taxation. At the outset, this Court rejected the very approach proffered to date by the Government in this litigation. *Cf.* at 5-6 ("[T]he Government urged us to view this case as an ordinary tax case without regard to the . . . relevant statutes, congressional policy concerning Indians, or the guardian-ward relationship between the United States and these particular Indians."). This Court then acknowledged the general maxim that tax exemptions should be clearly expressed. *Id.* ("We also agree that, to be valid, exemptions to tax laws should be clearly expressed."). Next, this Court also noted that the statutory provision on which the Indians based their exemption did not unequivocally provide for non-taxability. *Id.* ("[A]lthough this statutory provision is not expressly couched in terms of non-taxability . . ."). Most importantly, after stating the general tax-exemption maxim and acknowledging that the statutory provision did not unambiguously establish a tax exemption, this Court invoked the Indian-law canons of construction:

> [D]oubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and in good faith. Hence, in the words of Chief Justice Marshall, "the language used in treaties with the Indians should never be construed to their prejudice . . .".

Id. at 6-7 (quoting *Carpenter v. Shaw*, 280 U.S. 363, 367 (1930)). Finally, the *Squire* Court quoted a 1925 opinion of the Attorney General that had earlier found a tax exemption (even without a clear statutory basis for the exemption) and

had set forth a portion of federal Indian policy manifestly relevant to this case:

> . . . In other words, it is not likely to be assumed that Congress intended to tax the ward for the benefit of the guardian.

Squire, 351 U.S. at 8.[7]

McClanahan v. Arizona State Tax Commission, 411 U.S. 164 (1973), demonstrates the continuing vitality of *Squire*. In addressing the statute under which the exemption at issue was claimed, this Court acknowledged the general tax-exemption maxim, invoked *Squire*, and illustrated how asserted Indian tax exemptions should be evaluated in the presence of federal statutory ambiguity:

> Nor is the Arizona Enabling Act [of June 20, 1910, ch. 310, 36 Stat. 557,] silent on the specific question of tax immunity. The Act expressly provides that "nothing herein, or in the ordinance herein provided for, shall preclude the said State from taxing as other lands and other property are taxed any lands and other property *outside of an Indian reservation* owned or held by any Indian." *Id.*, at 570 (emphasis added). **It is true, of course, that exemptions from tax laws should, as a general rule, be clearly expressed. But we have in the past construed language far more ambiguous than this as providing a tax exemption for Indians. *See*, *e.g.*, *Squire v. Capoeman*, 351 U.S. 1, 6 (1956),** and we see no reason to give this language an especially crabbed or restrictive meaning.

411 U.S. at 175-76 (bold emphasis added).

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7. 34 Op. Atty. Gen. 439, 445 (1925). This Court also articulated that principle without attribution in *Superintendent of the Five Civilized Tribes v. Commissioner of Internal Revenue*, 295 U.S. 418, 420 (1935).

McClanahan has additional relevance to this case for several reasons. Initially, the *McClanahan* Court clearly recognized that the Indian-law canons of construction supersede the general tax-exemption maxim where both might otherwise theoretically apply. Second, it reasserted the general nature of the tax-exemption maxim, and, by so doing, indicated that general maxim's subservience to the specific Indian-law canon on statutory ambiguity. Third, by comparing the ambiguity of the Arizona Enabling Act of June 20, 1910, ch. 310, 36 Stat. 557, at 570, to the statute at issue in *Squire* (and labeling the *Squire* statute "far more ambiguous"), *McClanahan*, 411 U.S. at 175-76, this Court demonstrated that the application of the Indian-law statutory-ambiguity canon is not dependent upon a specific *degree* of statutory ambiguity. Finally, *McClanahan*'s use of the *federal* tax exemption *Squire* opinion in a case of asserted exemption from *state* taxation confirms that the primacy of the Indian-law canons over the general tax-exemption maxim inheres regardless of whether the claimed exemption is from federal taxation or from state taxation.[8]

Lastly, *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973), provides yet another example of this Court construing an ambiguous federal statutory provision broadly in favor of Indian interests to recognize a tax exemption, the general tax-exemption maxim notwithstanding. There, this Court construed 25 U.S.C. § 465's exception from *ad valorem* property taxation on "lands, interests in lands, water rights and surface rights" to encompass an exemption from a use tax on personal property that was later attached to the land.[9]

8. See also the exemption-from-state-taxation case *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 155-56 (1973), where this Court invoked *Squire* as if it were fully interchangeable with this Court's federal-authorization-of-state-taxation case law.

9. In so doing, this Court expressly acknowledged that a property tax and a use tax on personalty later attached to real property were two different things. *E.g.*, *id.* at 158 ("This is not to say that use taxes are for all purposes deemed simple ad valorem property taxes.").

Even though an exemption for use taxes was not unambiguously provided for in the statute, this Court unequivocally indicated that its finding of an exemption was based on statutory construction that resulted in an outcome favorable to Indian interests:

> . . . [U]se of permanent improvements upon land is so intimately connected with use of the land itself that an explicit provision relieving the latter from state taxation must be **construed** to encompass an exemption for the former.

411 U.S. at 158 (emphasis added).

From those opinions of this Court, a constant theme emerges spanning almost a century. When actual textual ambiguity exists concerning a possible tax exemption benefitting Indians, broad construction in favor of the Indians' interests occurs, the general tax-exemption maxim notwithstanding.

D. NO DECISION OF THIS COURT HAS CONSTRUED A GENUINE TEXTUAL STATUTORY AMBIGUITY CONCERNING A POTENTIAL INDIAN TAX EXEMPTION IN A MANNER AGAINST INDIAN INTERESTS.

A careful examination of the Indian-law-related cases in which this Court has merely declined to infer a tax exemption *from pure policy untethered to statutory text* is particularly germane to the issue in this case. Such a review demonstrates that no decision of this Court has held in a case of *actual textual ambiguity* concerning exemption from taxation for Indians that, because of the absence of a textual "plain statement" of the tax exemption, the ambiguity must be construed narrowly against the Indians and in favor of their guardian, the Government. In other words, when an

actual textual ambiguity has existed, this Court has not superseded the Indian-law canons with the general tax-exemption maxim to the Indians' detriment.[10]

In this Court's Indian-law decisions involving tax exemptions, treatment and result differ significantly between those cases in which this Court has recognized the existence of an actual textual ambiguity and those cases in which no such ambiguity was found. When this Court has found an actual ambiguity, and thus had to engage in construction, this Court has applied the Indian-law statutory-ambiguity canon to construe the ambiguity in favor of the particular tax exemption for Indian interests.[11] On the other hand, when no actual ambiguity was found, and hence nothing existed to construe by application of the Indian-law canons, this Court has routinely announced that exemptions cannot be "implied" [from pure policy untethered to statutory text].

The earliest in this sequence of cases, *The Cherokee Tobacco*, 78 U.S. (11 Wall.) 616 (1870), cited to this Court by the Government in its response in this case, *see* Br. for the United States at 12, involved no actual textual ambiguity, hence no holding arose as to the role of the general tax-exemption maxim in light of the Indian-law statutory-ambiguity canon when actual textual Indian-law tax-exemption ambiguity exits. In that case, Congress applied certain taxes to "articles produced anywhere within the

10. This Court has recently indicated in a treaty case that the Indian-law canon requiring ambiguities to be construed in favor of Indian interests also supersedes a general presumption about the legality of executive action. *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 194 n.5 (1999). That same reasoning is consistent with affording to the Indian-law canons pride of place in the tax-exemption context.

11. *E.g.*, *Montana Blackfeet Tribe of Indians*, 471 U.S. 759 (1985); *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973); *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164 (1973); *Squire v. Capoeman*, 351 U.S. 1 (1956); *Choate v. Trapp*, 224 U.S. 665 (1912).

exterior boundaries of the United States, whether . . . within a collection district or not." Act of July 20, 1868, ch. 186, § 107, 15 Stat. 167. The tobacco of the Cherokee Respondents was seized for failure to bear federal tax stamps. The Indians noted that the Indian Territory was not within any revenue collection district of the United States, and argued that Congress had not intended to apply the 1868 statute in the Indian Territory. This Court held that the tax applied. In finding the statute unambiguous (and therefore presenting nothing for construction), the mention of the general tax-exemption maxim revealed itself simply as general *dictum* that a tax exemption cannot be implied from pure policy:

> **The language of the section is as clear and explicit as could be employed**. It embraces **indisputably** the Indian territories. Congress not having thought proper to exclude them, it is not for this court to make the exception. If the exception had been intended it would doubtless have been expressed. **There being no ambiguity, there is no room for construction.** It would be out of place. The section must be held to mean what the **language imports.** When a statute is **clear and imperative,** reasoning *ab inconvenienti* is of no avail. It is the duty of the courts to execute it. Further discussion of the subject is unnecessary. We think it would be like trying to prove a self-evident truth. . . .

The Cherokee Tobacco, 78 U.S. (11 Wall.) at 620 (emphasis added) (citations omitted).

In *Choteau v. Burnet*, 283 U.S. 691 (1931), also invoked previously by the Government, *see* Br. for the United States at 10, 11, 12, again this Court found no actual textual Indian-law statutory ambiguity on which to base a holding as to the relative weight of the general tax-exemption maxim

vis-a-vis that of the Indian-law canons of construction. There, Choteau, an emancipated Osage Indian, claimed that his "headright" income was exempt from federal income taxation for two reasons. Neither assertion was based on an actual statutory ambiguity. *Choteau's* first basis, that he was "exempt because of his status as an Indian," *id.* at 694, was based only on policy, as this Court expressly noted, *id.* ("The assertion requires a reference to the policy of the government with respect to Indians."). Additionally, Choteau asserted that his income came from an "exempt source" – royalties that prior to distribution were held by the Government in trust for the tribe. *Id.* at 696.

In rejecting the "exempt source" assertion, this Court pointed to absolutely no statute, much less any statutory ambiguity that required construction. Instead, this Court focused entirely on the now-obsolete "instrumentality" doctrine. *See id.* at 696-97. Thus, while the *Choteau* Court did quote the general tax-exemption maxim in the "exempt source" portion of its opinion, other than insofar as that maxim precludes the implication of tax exemptions from pure policy untethered to statutory text, that maxim had nothing to do with the actual resolution of the "exempt source" issue – or for that matter, with the resolution of anything else in the case.[12] As in *The Cherokee Tobacco*, the *dictum*

12. Nor do any of the cases *cited* in the relevant section of *Choteau* involve an actual Indian-law statutory textual ambiguity, much less hold that in such an instance the actual ambiguity must be construed against the Indians to the benefit of the federal government because the general tax-exemption maxim somehow supersedes the Indian-law canons. In *Heiner v. Colonial Trust Co.*, 275 U.S. 232 (1927), this Court considered whether a non-Indian oil and gas lessee of Osage mineral interests was exempt from federal income tax. The non-Indian raised the then-operative, constitutionally-based "federal instrumentality" doctrine. This Court rejected that argument by noting that the "federal-instrumentality" doctrine could not even then bind

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concerning the general tax-exemption maxim arose in *Choteau* from no ambiguity, much less from the construction of an Indian-law statutory ambiguity.

Superintendent of the Five Civilized Tribes v. Commissioner of Internal Revenue, 295 U.S. 418 (1935), also cited by the Government at the Petition stage, *see* Br. of the United States at 10, 12, does not hold that in the case of an actual, textual Indian-law statutory ambiguity, on which Indians claim a tax exemption, the general tax-exemption maxim requires that the ambiguity be construed

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Congress with respect to the imposition of a federal tax, and then found that the text of the Revenue Act of 1916 provided compelling evidence that Congress meant what it said (and hence no ambiguity existed). *Id.* at 234-35. This Court went on to reject an assertion, based on the policy that Indians are impliedly exempt from income tax, that non-Indian lessees of Indians are also exempt. *Id.* at 235. No ambiguity was found. No construction occurred. The Indian-law canons were not mentioned. The mention of the general tax-exemption maxim therefore was simply *dictum*.

Shaw v. Gibson-Zahniser Oil Corp., 276 U.S. 575 (1928), is for present purposes no different than *Heiner*. In *Shaw*, an oil company asserted a "federal instrumentality" exemption from state gross-production taxes on land that was purchased for a restricted Indian with proceeds from royalties of a lease of his restricted allotment lands. This Court rejected the exemption. In so doing, this Court found no Indian-related statute ambiguous, engaged in no statutory construction, and did not mention the Indian-law canons of construction. Consistent with the absence of an ambiguity, this Court found the statutory authority for taxation clear:

> The Act of May 27, 1908, contains no express exemption from taxation of the proceeds of restricted lands, but section 4 *expressly subjects lands from which restrictions have been removed to state taxation.*

Id. at 581 (emphasis added).

in favor of the Government and against Indian interests. There, funds derived from the restricted allotment of a Creek Indian were invested, with the proceeds held in trust for the Indian by the Superintendent under the direction of the Secretary of the Interior. This Court held those proceeds subject to federal income tax. There was no finding that any statutory provision on which the claimed tax exemption was based was ambiguous. In fact, this Court first found that the Revenue Act of 1928 was *unambiguous*, *id.* at 420 ("The terms of the 1928 Revenue Act are very broad, and nothing there indicates Indians are to be excepted."), then emphasized the absence of ambiguity in such a way as to make its quotation of the *Choteau dictum*, *see Superintendent*, 295 U.S. at 420 (quoting *Choteau*, 283 U.S. at 693), only *dictum* yet again.

The *Superintendent* Court then addressed two statutes[13] cited to it as potential sources of the Indian's *income* tax exemption. This Court unequivocally found that the 1906 statutory exemption "related to *land* and not to income derived from investment of surplus *income from land*." *Id.* at 421 (emphasis added). Likewise, the 1908 statute was functionally identical. *See id.* Simply put, there was no actual textual statutory ambiguity to construe, hence no construction, and therefore no holding that such an actual ambiguity would be construed narrowly against the Indians' claim of a tax exemption and in favor of the government. Consistent with prior decisions of this Court in which no Indian-law statutory ambiguity was found, the Indian-law canon was not mentioned.

Finally, *Mescelaro Apache Tribe v. Jones*, 411 U.S. 145 (1973),[14] likewise does not hold that in the construction of an

13. Act of April 26, 1906, § 19, 34 Stat. 137; Act of May 27, 1908, § 4, 35 Stat. 312.

14. *Mescalero Apache* was decided the same day as *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164 (1973), a case with which *Mescalero Apache* should be read *in pari materia*. The implications of *McClanahan* are discussed in substantial detail above. *Supra* at 19-20.

actual federal statutory ambiguity concerning a tax exemption for Indians the general tax-exemption maxim supersedes the Indian-law canons. In *Mescalero Apache*, the tribe sought to exempt income from its off-reservation ski resort from a state gross receipts tax. Once again without construction of any federal statutory ambiguity, the *Mescalero Apache* Court rejected the assertion that an exemption from that tax should be implied from pure policy – which was exactly what the tribe's first argument (based on the long-defunct federal instrumentality doctrine, *see id.* at 154-55) essentially sought.

This Court then went on to address the tribe's second basis for the claimed exemption from the gross receipts tax, Section 5 of the Indian Reorganization Act of 1934, 48 Stat. 985 (codified at 25 U.S.C. § 465 (1970)). Although the *Mescalero Apache* Court mentioned the general tax-exemption maxim in that context, *see* 411 U.S. at 156, it made clear that no textual ambiguity existed:

> On the face of § 465, therefore, there is no reason to hold that it forbids income as well as property taxes.

Id. at 157.

As the above-discussed decisions demonstrate, this Court has not used the general tax-exemption maxim to supersede the Indian-law statutory-ambiguity canon in the construction of an actual textual ambiguity. Rather, that general maxim has been mentioned in Indian-law-related cases only as *dicta* when this Court acknowledged the impropriety of inferring a tax exemption from pure policy untethered to statutory ambiguity.

PROPOSITION TWO

APPLICATION OF THE APPOSITE PRINCIPLES OF CONSTRUCTION RESULTS IN THE CONCLUSION THAT 25 U.S.C. § 2719(d)(1) CREATES AN EXEMPTION FOR INDIAN TRIBES FROM THE FEDERAL WAGERING (AND RELATED OCCUPATIONAL) TAXES THAT IS IDENTICAL TO THE EXEMPTION ENJOYED BY STATES UNDER CHAPTER 35 OF THE INTERNAL REVENUE CODE.

A. 25 U.S.C. § 2719(d)(1) IS FACIALLY AMBIGUOUS.

The ambiguity of 25 U.S.C. § 2719(d)(1) is patent. On the one hand, Congress may have focused its application of the Internal Revenue Code on provisions "concerning the reporting and withholding of taxes with respect to the winnings from gaming or wagering operations." But on the other hand, Congress expressly included in its identification IRC provisions § 6050I and Chapter 35 of the IRC, neither of which have anything to do with the reporting and withholding of taxes with respect to winnings. *Chickasaw*, 208 F.3d at 883; *Little Six*, 210 F.3d at 1365. Instead, Chapter 35 establishes the wagering (and related occupational) taxes – and the exemptions for states from those taxes – to which the Petitioners claim entitlement here.

The ambiguity created by that conflicting statutory language has been recognized directly by two opposing sets of appellate judges within one circuit, and at least implicitly by another circuit.[15] No appellate court addressing the

15. *Little Six, Inc. v. United States*, 210 F.3d 1361, 1365 (Fed. Cir. 2000) ("In view of the inconsistency between the statute's reference to winnings and its reference to section 6060I and Chapter 35 of the Internal Revenue Code, we conclude that the language in section 2719(d)(1) is **ambiguous**" (emphasis added)); *Little Six, Inc. v.* (Cont'd)

statutory language has pronounced it clear and unambiguous. That facial ambiguity inheres in § 2719(d)(1) is beyond legitimate doubt.

B. THE LEGISLATIVE HISTORY OF IGRA THAT IS SPECIFICALLY RELEVANT TO THE TAX EXEMPTION ISSUE RAISED BY 25 U.S.C. § 2719(d)(1) DOES NOT CLEARLY RESOLVE THAT ISSUE AGAINST INDIAN TRIBES.

The judicially-recognized statutory ambiguity described above persists even after review of the legislative history.[16] What ultimately became IGRA originated as H.R. 1920, 99th Cong. (1986), which was passed by the House of Representatives in 1986. The Senate did not adopt the bill prior to the end of the 99th Congress. H.R. 1920 contained only one section that addressed taxation:

> Provisions of the Internal Revenue Code of 1954, as amended, concerning the taxation and the reporting and withholding of taxes pursuant to the operation of a gambling or wagering operation shall

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United States, 229 F.3d 1383, 1384 (Dyk, J., dissenting from denial of rehearing) ("Despite the government's efforts, **there is no way to reconcile** § 2719(d)(1)'s literal limitation to provisions of the Internal Revenue Code 'concerning the reporting and withholding of taxes with respect to the winnings from gaming or wagering operations' with its parenthetical reference to Chapter 35" (emphasis added)); *Chickasaw*, 208 F.3d at 871 (10th Cir. 2000) ("Although it is true that § 2719(d)(1)'s reference to Chapter 35 is somewhat **cryptic** . . ." (emphasis added)).

16. In *Rice v. Rehner*, 463 U.S. 713, 733 (1983), this Court indicated that the Indian-law canons of construction are not to be employed when Congressional intent against the Indians' interest is clear from the face of the statute and its legislative history. Here, the face of the statute and the legislative history do not clearly demonstrate that the construction of § 2719(d)(1) proffered by the Petitioner Nations is incorrect.

> apply to the operations in accordance with the Indian Gaming Regulatory Act the same as they apply to State operations.

H.R. 1920, § 4, 99th Cong. (1986).

In commentary on that section, the House Committee Report for H.R. 1920 expressly identified two portions of the IRC, 26 U.S.C. § 3402(q) (1994) (which involves only reporting and withholding of taxes related to the operation of gaming activities), and Chapter 35 (which both authorizes the taxes and creates the state gaming exemption from them at issue here). That Report stated:

> Section 4 provides that related provisions of the Internal Revenue Code, such as section 3402(q) and Chapter 35, 26 U.S.C., concerning taxation and the reporting and withholding of taxes relating to the operation of gaming activities shall apply to tribal gaming activities as they apply to State operated gaming activities.

H.R. Rep. No. 99-488, at 13 (1986).

The floor debate on H.R. 1920 contained nothing on the matter of federal taxes or exemption from them.

In the 100th Congress, the Senate considered S. 555, 100th Cong. (1987), which ultimately became IGRA. Section 20(d) of S. 555, 100th Cong. (Feb. 19, 1987), initially contained the same general language about taxation that had been included in Section 4 of H.R. 1920.

During the Senate's consideration of S. 555, the more specific language at issue here, including the reference to IRC Chapter 35 contained in H.R. Rep. No. 99-488, at 13, was substituted for the phrase that included the general reference to "taxation." Section 20(d) of S. 555, 100th Cong.

(1987) (which ultimately was enacted as what is now 25 U.S.C. § 2719(d)) was modified to provide:

> **(d) Application of the Internal Revenue Code of 1986.**
>
> (1) The provisions of the Internal Revenue Code of 1986 (including sections 1441, 3402(q), 6041, and 6050I, and Chapter 35 of such Code) concerning the reporting and withholding of taxes with respect to the winnings from gambling or wagering operations shall apply to Indian gaming operations conducted pursuant to this chapter, or under a Tribal-State compact entered into under section 2710(d)(3) of this title that is in effect, in the same manner as such provisions apply to State gaming and wagering operations.

The expressly-identified IRC §§ 1441, 3402(q) and 6041 do concern the reporting and withholding of taxes with respect to winnings (by a person other than the gaming operator) from gaming or wagering operations. However, the last two specifically-identified IRC components, § 6050I and Chapter 35, have nothing to do with the reporting and withholding of taxes with respect to such winnings by a non-operator.[17] Chapter 35, on which this controversy centers, imposes on the tribal gaming operator the taxes in dispute here[18] and, among other items, creates an exemption from those taxes in favor of state gaming operators.[19]

The only committee report that accompanied what ultimately became IGRA is silent on § 2719(d)(1)'s reference to IRC § 6050I and Chapter 35. In its "section by section

17. *Chickasaw*, 208 F.3d at 883; *Little Six*, 210 F.3d at 1365.

18. 26 U.S.C. §§ 4401, 4411 (1994) (App. 91a, 94a).

19. 26 U.S.C. § 4402 (1994) (App. 92a).

analysis," the Senate Report merely states that Section 20(a)-(d):

> Sets forth policies with respect to lands acquired in trust after enactment of this act and applies the Internal Revenue Code to winnings from Indian gaming operations.

S. Rep. No. 100-446, 100th Cong., at 20 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071, 3090.

Nothing in that Committee Report clearly indicates that the tax exemption enjoyed by states was to be unavailable to the Indian tribes conducting the same activity as states to provide revenue for governmental purposes, nor is there an indication to the contrary. Likewise, the debate on IGRA on the floors of the Senate and the House of Representatives contain no mention of the question of federal taxation.

The unexplained changes in S. 555 as it moved through the legislative process are also inconclusive. While S. 555 initially contained a general reference to "taxation," the specific reference to the exemption-containing IRC Chapter 35 was substituted for that general provision. That substitution of the specific for the general renders inapplicable the sometimes-employed rule that a deletion of express language in an earlier draft (when replaced with nothing) is some evidence that Congress did not intend a result consistent with that deleted language.[20] Here, however,

20. As a general principle, deletion of express language from an earlier draft, by itself, provides some evidence that Congress did not intend as a result the deleted provision. However, it is the application of that principle that is important. For example, in *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987), cited by the Government to this Court in material respect at the Petition stage, *see* Br. for the United States at 8, the critical passage (making a refugee ineligible for asylum unless his deportation or return would be prohibited by a particular section of

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the *substitution* of the specific exemption-containing IRC Chapter 35 for the general term "taxation" is not simply a deletion, but can be viewed as merely a different way of indicating the same result.[21]

At the end of the review of the legislative history one fact remains. That history does not clearly demonstrate Congress' intent – one way or another – as to whether Indian tribes engaged in gaming pursuant to IGRA shall be precluded from the Chapter 35 tax exemption provided to states engaged in similar activity. Without such a clear indication of Congressional intent from the face of the statute and its legislative history, the ambiguity remains and requires construction for resolution.[22]

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the Immigration and Nationality Act) was replaced with nothing, thus giving rise to this Court's statement that "Congress does not intend *sub silentio* to enact . . ." 480 U.S. at 442-43. That same replacement with nothing occurred in *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 199-200 (1974), and *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 152-53 n.9 (1973), also earlier relied upon by the Government, *see* Br. for the United States at 8. The "deletion" principle should have no application here, since the phrase containing the general reference to "taxation" in the earlier version of S. 555 was replaced with the specific reference to the exemption-containing Chapter 35, thus precluding any conclusion premised on mere deletion.

21. In at least one Indian-law case, *Oklahoma Tax Comm'n v. Barnsdall Refineries, Inc.*, 296 U.S. 521 (1936), even the *deletion* of language from the final draft of a statute was not dispositive. There, this Court disregarded the deletion of the critical word "now" (which had been stricken from the final version of the bill as enacted), and adopted a construction giving application to that stricken word for the benefit of the lessee of Indian lands. *Id.* at 523-25.

22. This Court has not indicated that application of the Indian-law canons can be avoided by *seriatim* resort to legislative history at ever-increasing levels of remoteness to resolve virtually any textual ambiguity. If such were the case, then (since the Indian-law canons

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C. 25 U.S.C. § 2719(d)(1) SHOULD THEREFORE BE CONSTRUED AS EXTENDING THE WAGERING (AND RELATED OCCUPATIONAL) TAX EXEMPTIONS ENJOYED BY STATES UNDER IRC CHAPTER 35 TO TRIBAL GOVERNMENTAL GAMING OPERATIONS.

In this case, application of the deeply-rooted principle expressed in the eminently sound and vital Indian-law statutory-ambiguity canon discussed above to the facially ambiguous 25 U.S.C. § 2719(d)(1) can yield only one result, in light of the legislative history's inability to provide clear

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operate solely in the presence of ambiguity) "continued vitality" would be merely semantic since not only could they not control the outcome of any litigation, but also they could never even theoretically *apply*. *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989), to which the Government referred this Court at the Petition stage, *see* Br. for the United States at 13, certainly does not support such a canon-destroying view. In *Cotton Petroleum*, this Court took great pains to re-emphasize the canons' continued vitality. *See* 490 U.S. at 177 ("[A]mbiguities in federal law are, as a rule, resolved in favor of tribal independence."); *id.* ("[E]ven when [the relevant Congressional reports are] considered *(in their broadest possible terms* . . . (emphasis added)); *id.* at 179 (same); *id.* at 186 (same). Moreover, the tribe in *Cotton Petroleum* sought to ground an exemption on a statute that was utterly silent about the matter, unlike here, where the statute is textually ambiguous. While the Petitioners in no measure deny the potential force of dispositive legislative history in appropriate cases, *Cotton Petroleum* does not support an Indian-law-canon-evading "keep reviewing the legislative history until something moves the issue off equipoise" approach to resolving federal statutory ambiguities affecting Indian Tribes. *Hagen v. Utah*, 510 U.S. 399 (1994), and *Oregon Dep't of Fish & Wildlife v. Klamath Indian Tribe*, 473 U.S. 753 (1985), also invoked by the Government at the Petition stage, *see* Br. for the United States at 13, are also subject to similar observations. In short, for the Indian-law canons to have actual vitality, they must at some point meaningfully be controlling. *Cotton Petroleum*, *Hagen* and *Klamath* in no way impeach that conclusion.

resolution against the Petitioners' interests. That section's express inclusion of IRC Chapter 35 (which has absolutely nothing to do with the reporting and withholding of taxes with respect to winnings) must be construed liberally in favor of the Nations for their benefit, by making available to governmental-gaming tribes the same tax exemption provided by IRC Chapter 35 to states engaged in governmental gaming activity.

Failure to apply the Indian-law canons of construction in this case would cause multiple deleterious consequences. First, such a failure would violate the Congressional intent suggested by IGRA's specific legislative history – that the Indian-law canons be used to resolve ambiguities in that Act.

Second, such a failure could herald the practical death of that "eminently sound and vital canon." This Court has applied the canons to statutes far less ambiguous than § 2719(d)(1). *See McClanahan*, 411 U.S. at 175-76. If statutes that did not contain the patent ambiguity present here triggered application of the Indian-law canons, and were this Court now to determine that the more ambiguous § 2719(d)(1) did not trigger their force even absent dispositive legislative history, then the real conclusion would inevitably be that the Indian-law canons were no longer "eminently sound and vital." Either the statutory-ambiguity canon, which contains no qualification as to its application, retains pride of place as a tool of construction of Indian-related statutes whose ambiguity is unresolved by clear legislative history, or it does not. If no longer preeminent, this canon would become completely ineffectual because a clever reason to avoid its application by elevation of another rule (or reference to increasingly creative interpretations of increasingly remote legislative history) could always be advanced.

Third, a failure to apply the Indian-law statutory-ambiguity canon to the admittedly ambiguous § 2719(d)(1) would constitute a judicially-driven change in fundamental federal Indian policy without clear, supporting Congressional direction. The statutory-ambiguity canon is "rooted in the unique trust relationship between the U.S. and the Indians." *See County of Oneida*, 470 U.S. at 247-48. The Petitioners respectfully suggest that no Congressional action authorizes a judicial articulation of such a radical change in federal Indian policy.

At the end of the day the choice is clear: either the Indian-law statutory-ambiguity canon still remains vital as the dispositive tool to resolve an obvious textual ambiguity in an Indian-law-related statute when such ambiguity is not *clearly* resolved against tribal interests by legislative history, or it does not. No legitimate reason exists to deprive the Indian-law statutory-ambiguity canon of that vitality.

PROPOSITION THREE

THE CONSTRUCTION OF § 2719(d)(1) IN FAVOR OF THE TAX EXEMPTION FOR THE PETITIONER NATIONS IS CONSISTENT WITH AND MATERIALLY ADVANCES IMPORTANT FEDERAL INDIAN POLICIES EMBODIED IN IGRA.

Application of the Indian-law statutory-ambiguity canon results in a construction of § 2719(d)(1) that is consistent with the federal Indian policy embodied in IGRA. The background of Indian governmental gaming explained by this Court in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987),[23] the Senate Committee Report accompanying IGRA, and the express language of IGRA all

23. In *Cabazon Band*, this Court expressly recognized the "congressional goal of Indian self-government, including its 'overriding goal' of encouraging tribal self-sufficiency and economic development" in the specific tribal-gaming context. 480 U.S. at 216.

resonate the same federal Indian policy. Tribal gaming is "governmental gaming, the purpose of which is to raise tribal revenues for member services." S. Rep. No. 100-446, 100th Cong., at 12 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071, 3082. Specifically, Congress' central purpose in enacting IGRA was to "provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments. . . ." 25 U.S.C. § 2702(1) (1994). Gaming pursuant to IGRA advances that purpose by providing tribal governments with a method of funding those governmental needs, while breaking the cycle of dependency on federal appropriations. In discussing tribal gaming operations, the Senate Committee concluded that "for those tribes that have entered into the business of business, the income often means the difference between an adequate governmental program and a skeletal program that is totally dependent on Federal funding." S. Rep. No. 100-466 at 2-3, 100th Cong. (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071, 3072. The tribal tax exemption resulting from the application of the Indian-law canons to § 2719(d)(1)'s ambiguity would make more money available to assist the tribal governments in meeting their citizens' needs, and would thereby assist in breaking that cycle of dependency on Congressional appropriations.[24]

Application of the Indian-law statutory-ambiguity canon also results in a construction of § 2719(d)(1) consistent with the legislative indication that tribal governmental gaming under IGRA to raise revenue for governmental purposes is the same as governmental gaming conducted by state

24. *See also Cabazon Band*, 480 U.S. at 217 n.20 (quoting President Reagan's 1983 Statement on Indian Policy, which provided in pertinent part that "[i]t is important to the concept of self-government that tribes reduce their dependence on Federal funds by providing a greater percentage of the cost of their self-government." (citation omitted)).

competitors of tribes for identical purposes. No serious doubt can exist that at the time of IGRA's enactment, various states were engaged in gaming operations to provide governmental services to their citizens. The Senate Committee expressly noted that tribal governments, like state governments, were using gaming to provide governmental services to their citizens:

> Indian tribal elected officials demonstrated to the Committee that bingo revenues have enabled tribes, like lotteries and other games have done for State and local governments, to provide a wider range of government services to tribal citizens and reservation residents than would otherwise have been possible.

S. Rep. No. 100-446 at 2, 100th Cong. (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071, 3072.

That Senate Committee Report's observation is clearly consistent with an intent that Indian tribes using gaming to meet governmental responsibilities be viewed as engaging in the same type of governmentally-sponsored activity, to generate the same type of revenue and to provide the same type of governmental service as their state government competitors. Tribes, therefore, should not be treated less favorably by the federal government than those state competitors. The construction resulting from the Indian-law statutory-ambiguity canon places tribal governmental gaming on the same tax footing as state governmental gaming.

Application of the Indian-law statutory-ambiguity canon also further results in a construction of § 2719(d)(1) consistent with the interpretation of it by the primary author of IGRA, Senator Daniel Inouye, the Chair of the Senate Select Committee on Indian Affairs. In response to proposals by the IRS to attempt collection of Chapter 35 taxes from

Indian tribes, Chairman Inouye wrote to the IRS Commissioner:

> As primary author of the Indian Gaming Regulatory Act, I write to advise you that it was the intention of the Congress that the tax treatment of wagers conducted by tribal governments be the same as that for wagers conducted by state governments under Chapter 35 of the Internal Revenue Code. Because the purpose of wagers for both tribal and state governments is to provide for the general welfare of their citizens, it was the view of the Congress that to impose a higher rate upon tribal government-conducted gaming activities would be unfair. Accordingly, it was this result that the Congress intended to avoid by including reference to Chapter 35, and stating that, "[t]he provisions of the Internal Revenue Code of 1986 (including . . . chapter 35) shall apply to Indian gaming operations conducted pursuant to this Act . . . in the same manner as such provisions apply to State gaming and wagering operations."

Letter from Sen. Daniel K. Inouye, Chairman, Senate Select Committee on Indian Affairs, to Hon. Fred T. Goldberg, Jr., Commissioner, Internal Revenue Service, Dec. 12, 1991. (App. p. 112a)

Senator Inouye's remarks should be given weight for several reasons. First, whether the remarks of the legislative sponsor were made before passage of a bill or after passage is not outcome determinative of their value to this Court. Rather, it is the status of the Senator, as the legislator chiefly responsible for guiding the act in question into enactment, that gives weight. In *Menominne Tribe v. United States*, 391 U.S. 404 (1968), this Court expressly relied on a post-passage statement of the legislative sponsor to bolster its conclusion

as to the effect of an Indian-related federal statute. *See id.* at 413 ("Our conclusion is buttressed by the remark of the legislator chiefly responsible for guiding the termination Act to enactment, Senator Watkins, who stated upon the occasion of the signing of the bill that it . . ."). Senator Inouye fulfilled that role here as the legislator chiefly responsible for guiding IGRA to enactment. His post-passage remarks deserve weight here, just as did Senator Watkins' post-passage remarks in *Menominne Tribe*.

Further, the Chairman's explanation was timely. The Petitioner Nations do not expect the Government to dispute that Senator Inouye promptly wrote to the IRS Commissioner when the IRS first disclosed its intention (after at least a decade of Indian gaming) to attempt to collect Chapter 35 taxes on Indian gaming. The Chairman's letter was not a recounting of ancient history by a back-bench legislator who had merely cast a vote decades earlier on a bill in which he had no meaningful involvement.

Finally, a more clear, authoritative and timely statement of the Congressional purpose for the substitution of the reference to IRC Chapter 35 for the phrase including "taxation" in 25 U.S.C. § 2917(d)(1) than Chairman Inouye's letter does not exist. The Senate Committee Report on IGRA and the floor debate in Congress are both silent on this subject.[25] At the very minimum, Senator Inouye's

25. Petitioners are aware that in circumstances substantially different from those here, this Court has declined to give weight to post-passage statements of legislators. In *Weinberger v. Rossi*, 456 U.S. 25 (1982), this Court found insufficient to establish the kind of affirmative Congressional expression of an intent to abrogate provisions in thirteen international agreements "one isolated remark by a single Senator, ambiguous in meaning when examined in context . . .", *id.* at 35. Here, the Chairman's letter to the IRS Commissioner is far from ambiguous in meaning when examined in context. In *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102 (1980), (Cont'd)

explanation, consistent with the *Little Six* Opinion, reinforces the possible construction of § 2719(d)(1) as providing the same tax exemptions for tribal governmental gaming as are afforded to state governmental gaming by IRC Chapter 35. That "possible construction" of the ambiguity in favor of tribal interests requires the Petitioner Nations to prevail. *See County of Yakima*, 411 U.S. at 174.

CONCLUSION

The Petitioner Nations request this Court to determine that 25 U.S.C. § 2719(d)(1) is ambiguous, to apply the Indian-law statutory-ambiguity canon of construction to that ambiguity, to construe that ambiguity liberally in favor of the availability of the tax exemption contained in IRC Chapter 35 to Indian tribes, to reverse the judgments of the Tenth Circuit against the Petitioners, and to remand this matter to that Court for the entry of judgments against the Government on its claims for wagering taxes against the Petitioner Nations and in favor of their claims for refunds and ancillary relief sought in the District Court.

(Cont'd)
this Court rejected the comments of a Congressman who did not sponsor the bill in question, but authored another bill, with different critical provisions that were not adopted. *See id.* at 118. Here, Senator Inouye was IGRA's primary author and sponsor. In *Chrysler Corp. v. Brown*, 441 U.S. 281 (1979), a case in which the reports of both Houses and statements of other members of Congress refuted a statutory interpretation consistent with the remarks of the sponsor, *id.* at 311, this Court explained that such remarks of a sponsor are not controlling in analyzing legislative history. But here, in contrast, nothing in the Senate Report or the statement of any other member of Congress refutes the Chairman's explanation. Finally, in *TVA v. Hill*, 437 U.S. 153 (1978), this Court recognized that such a statement could not serve to change the legislative intent of Congress expressed before the Act's passage. *See id.* at 193. Here, no such clear statement of pre-passage legislative intent of Congress's inclusion of Chapter 35 in § 2719(d)(1) exists, much less is sought to be changed by the Chairman's explanation.

Respectfully submitted,

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No. 00-507

In the Supreme Court of the United States

THE CHICKASAW NATION AND
THE CHOCTAW NATION OF OKLAHOMA, PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether Section 20(d) of the Indian Gaming Regulatory Act, 25 U.S.C. 2719(d), exempts Indian Tribes from the wagering excise and occupational taxes imposed by Sections 4401 and 4411 of the Internal Revenue Code.

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals in *Chickasaw Nation* v. *United States* (Pet. App. 1a-28a) is reported at 208 F.3d 871. The order of the court of appeals in *Choctaw Nation* v. *United States* (Pet. App. 29a-32a) is unpublished, but the decision is noted at 210 F.3d 389 (Table). The opinions of the district court in *Chickasaw Nation* v. *United States* (Pet. App. 47a-65a) and *Choctaw Nation* v. *United States* (Pet. App. 33a-46a) are unreported.

JURISDICTION

The judgment of the court of appeals in each case was entered on April 5, 2000. Petitions for rehearing were denied on July 5, 2000. Pet. App. 66a-67a. The petition for a writ of certiorari was filed on October 3, 2000, and granted on January 22, 2001. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 20(d) of the Indian Gaming Regulatory Act. 25 U.S.C. 2719(d), and Sections 4401, 4402, 4411 and 4421 of the Internal Revenue Code of 1986, 26 U.S.C. 4401, 4402, 4411 and 4421, are set forth at Pet. App. 90a-98a. Relevant portions of Section 7871 of the Code are set forth at App., *infra*, 1a-4a.

STATEMENT

1. Section 4401(a) of the Internal Revenue Code of 1986 (I.R.C. or the Code) imposes an excise tax on all wagers. Section 4411 imposes an occupational tax on each person liable for the wagering excise tax. (We sometimes refer to these taxes jointly as the "wagering excise taxes.") The term "wager" includes any lottery. I.R.C. § 4421(1). Section 4402(3) grants an exemption from the wagering excise taxes for state-conducted lotteries, but that exemption does not apply, by its terms, to tribal lotteries. Section 7871(a)(2) of the Code provides that Tribes are to be treated as States for purposes of exemption from a number of federal excise taxes (so long as the transaction at issue involves the exercise of an essential government function), but the taxes specified do not include the wagering excise taxes.

The Indian Gaming Regulatory Act (IGRA), Pub. L. No. 100-497, 102 Stat. 2467 (25 U.S.C. 2701 *et seq.*),

provides a federal regulatory framework for tribal gaming operations. Section 20(d) of the IGRA, 25 U.S.C. 2719(d), provides in part:

> The provisions of the Internal Revenue Code of 1986 (including sections 1441, 3402(q), 6041, and 6050I, and chapter 35 of such Code) concerning the reporting and withholding of taxes with respect to the winnings from gaming or wagering operations shall apply to Indian gaming operations * * * in the same manner as such provisions apply to State gaming and wagering operations.

Chapter 35 of the Internal Revenue Code includes Sections 4401-4424 of the Code.

2. Petitioners are federally recognized Indian Tribes that operate gaming activities, including the sale of "pull-tabs." Pet. App. 2a, 30a. In a pull-tab game, a player buys a card and then peels back tabs on the card to reveal hidden symbols, which determine whether the card may be exchanged for a cash prize. *Ibid.*; see Choctaw C.A. App. CH.0152. The cards are manufactured in sets of 24,000, and each set has a predetermined number of winners. Pet. App. 3a, 31a. Pull-tab games are "lotteries" for purposes of the federal wagering excise taxes. Rev. Rul. 57-258, 1957-1 C.B. 418.

The Internal Revenue Service audited petitioners and issued assessments for unpaid wagering and occupational taxes with respect to various periods from 1988 to 1994. Petitioners paid a portion of the taxes assessed and then filed suits in federal district court seeking refunds of the taxes paid. The United States counterclaimed in each case for the unpaid portion of the assessments. Pet. App. 34a, 47a-48a.

The district court rejected petitioners' refund claims and granted summary judgment for the government in each case. Pet. App. 33a-46a, 47a-65a. As relevant here, the court in each case rejected the argument advanced by petitioners that imposition of the excise taxes was inconsistent with the IGRA. *Id.* at 41a-44a, 64a.[1]

3. The court of appeals affirmed in each case. Pet. App. 1a-28a, 29a-32a. In its opinion in the Chickasaw Nation case, the court addressed and rejected the argument that IGRA § 20(d)'s parenthetical reference to Chapter 35 of the Internal Revenue Code extends to Tribes the wagering tax exemption afforded to state lotteries under I.R.C. § 4402(3). Pet. App. 19a-26a. The court considered it "clear that [25 U.S.C.] § 2719(d) does not expressly prohibit the imposition of federal wagering excise or federal occupational taxes on Indian gaming activities." *Id.* at 22a. Rather, Section 2719(d) (IGRA § 20(d)) "provides only * * * that Indian gaming operations, like state gaming operations, must report certain player winnings to the federal government, and must likewise withhold federal taxes if players' winnings exceed a certain level." Pet. App. 22a.

The court of appeals observed that in the Indian Tribal Governmental Tax Status Act of 1982, Pub. L. No. 97-473, § 202(a), 96 Stat. 2608, Congress added to the

[1] Petitioner Choctaw Nation argued generally that imposition of the excise taxes was inconsistent with the IGRA, but it "[did] not argue that § 2719(d) (IGRA § 20(d)) provides an excise tax exemption for Indian gaming activities," and the district court accordingly "[did] not address" that issue in the Choctaw case. Pet. App. 43a-44a. The magistrate judge's decision in the Chickasaw Nation case did address that argument, and rejected it. *Id.* at 64a.

Internal Revenue Code a new Section 7871, which "granted tribes some of the tax advantages enjoyed by states," and in particular "extended to tribes many, but not all, of the federal excise tax exemptions typically enjoyed by the states." Pet. App. 23a. "Among the federal excise tax exemptions enjoyed by the states but not granted to tribes * * * was the exemption found in the IRC for 'State-conducted lotteries.'" *Ibid.* That situation, the court explained, provided the backdrop for Congress's consideration of the IGRA. During that consideration, the original version of the provision that became Section 2719(d) would have expressly granted an exemption of the sort sought by petitioners. That language, however, was deleted before the statute was enacted. *Id.* at 23a-24a.

The court found unpersuasive petitioners' reliance on a letter from Senator Daniel Inouye to the Commissioner of Internal Revenue, in which the Senator "suggest[ed] that by specifically referring to Chapter 35 in § 2719(d), 'it was the intention of Congress that the tax treatment of wagers conducted by Tribal governments be the same as that for wagers conducted by state governments under Chapter 35.'" Pet. App. 25a; see *id.* at 112a-114a (reprinting letter). The court noted that "the comments of a single senator, made years after the statute at issue was enacted, are of little value in interpreting the statute," and that in any event the proffered interpretation was "inconsistent with both the language and the legislative history of the statute." *Id.* at 25a. The court concluded:

> Although it is true that § 2719(d)'s reference to Chapter 35 is somewhat cryptic (since Chapter 35 pertains solely to wagering excise taxes and has nothing to do with the reporting and withholding of

taxes on wagering winnings), we believe the most reasonable conclusion is that the reference was included in order to incorporate Chapter 35's definitions of the terms "wager" and "lottery." In any event, we are unwilling to assume, based solely upon the inclusion of this parenthetical reference to Chapter 35, that Congress intended to provide tribes with the exemption from federal wagering excise taxes enjoyed by the states. Such an assumption would fly directly in the face of § 2719(d)'s express reference to "the reporting and withholding of taxes with respect to the winnings from gaming or wagering operations." Had Congress intended to provide tribes with an exemption from the federal wagering excise taxes, it clearly knew how to draft such an exemption.

Id. at 25a-26a.[2]

The court of appeals also affirmed the grant of summary judgment for the government in the Choctaw case, characterizing the issues on appeal in that case as "identical" to those at issue in the Chickasaw case, and relying on its opinion in the latter case. Pet. App. 29a-32a.

SUMMARY OF ARGUMENT

Petitioners do not contest that the federal wagering excise taxes apply by their terms to tribal gaming operations. Nor does any provision of the Internal

[2] The court of appeals also considered and rejected petitioner Chickasaw Nation's arguments that the purchase of a pull-tab card is not a "wager" subject to the federal excise tax (Pet. App. 5a-12a), that the Nation is not a "person" subject to the federal wagering taxes (*id.* at 12a-18a), and that an 1855 treaty between the Nation and the United States exempts it from those taxes (*id.* at 26a-28a). Those holdings are not at issue in this Court. See Pet. i.

Revenue Code, including the provision that exempts state lotteries from the wagering excise taxes and the provision that exempts Tribes from various other excise taxes, provide an exemption here. Petitioners therefore argue instead that Section 20(d) of the Indian Gaming Regulatory Act, 25 U.S.C. 2719(d), creates an exemption from the federal wagering taxes in favor of petitioners and other Tribes. That is not a reasonable construction of the IGRA.

The operative language of Section 2719(d) directs that all provisions of the Code "concerning the *reporting and withholding* of taxes with respect to * * * [a player's] *winnings*" are to apply to Tribes as they would to States. (Emphasis added.) That language cannot plausibly be read to refer to Code provisions concerning the *imposition* of excise taxes on a game operator's own *receipts* or *employment*. Petitioners' argument accordingly rests, not on the statute's operative language, but on its parenthetical listing of illustrative examples: "(including sections 1441, 3402(q), 6041, and 6050I, and chapter 35 of such Code)." In particular, petitioners rely on the reference to Chapter 35 of the Code, which imposes the federal wagering taxes, and includes an exemption from those taxes for state lotteries.

We agree with the court of appeals that Section 2719(d)'s reference to Code Chapter 35, as an example of the scope of the IGRA provision, is "somewhat cryptic," because that Chapter bears no obvious relation to the reporting and withholding of taxes on wagering winnings. Whatever meaning might plausibly be given to that reference, however, or even if it simply cannot be harmonized with the statute's operative text, it does not create a federal tax exemption. The reference is merely one of a series of unexplained cross-

references in an illustrative parenthetical. It cannot fairly be said to contradict limitations that inhere in the provision's central textual command. That is particularly true where the result that petitioners seek is a complete exemption from two federal excise taxes that are wholly unrelated to the reporting and withholding provisions to which Section 2719(d) otherwise refers.

The history of the IGRA confirms that conclusion. As originally proposed, the bill that became the IGRA included language that would indeed have extended to Tribes the state-lottery exemption to the wagering excise taxes. That language, however, was deleted from the bill, by the same committee that added the parenthetical illustrations at issue here. Deletion of the express exemption language is strong evidence of an intention not to create an exemption; and there is nothing to suggest that the new parenthetical language was intended to provide Tribes with a shorthand version of the express exemption that the drafters had just considered and deleted.

Finally, the purposes of the IGRA do not justify an inference of congressional intent to extend to Tribes the excise tax exemption granted to state lotteries. Although the goal of fostering tribal economic development and self-sufficiency is surely important, Congress can advance that goal without exempting Tribes from all federal taxes, or always treating Tribes in the same way that it treats States. The Internal Revenue Code expressly accords Tribes the benefit of some of the excise tax exemptions enjoyed by States. That provision does not, however, extend to the wagering excise taxes; and the express exemption from those taxes for state lotteries does not, by its terms, apply to Tribes. Against that background, the IGRA cannot plausibly be read to pursue general policies of tribal development by

conferring a federal tax exemption through a "cryptic" cross-reference in an illustrative parenthetical.

Petitioners scarcely contest that these traditional tools of statutory construction—text, history, purpose and context—do not support their quest for an exemption. Instead, they rely almost exclusively on the proposition that "ambiguity in an Indian-law-related federal statute is to be liberally construed in favor of tribal interests." Pet. Br. 12 (capitalization and emphasis omitted). If Section 2719(d) were genuinely susceptible of the construction that petitioners seek to place on it, it might be appropriate for the Court to take that principle into account—although even if it applied, it would not simply dictate resolution of the case in petitioners' favor, because the Court would also have to take into account the countervailing and similarly venerable principle that exemptions from federal taxation may not be inferred, but must be expressly stated. This case, however, does not resolve itself into a duel between competing canons of construction. Such canons are properly applied only after, or at least alongside, the central tools of statutory interpretation, and to resolve interpretive ambiguity, not to create it. In this case, those basic tools make clear that Section 2719(d) cannot be construed to extend the state-lottery tax exemption to tribal gaming.

ARGUMENT

SECTION 20(D) OF THE INDIAN GAMING REGULATORY ACT CANNOT PROPERLY BE CONSTRUED TO EXEMPT TRIBAL GAMING OPERATIONS FROM THE FEDERAL WAGERING EXCISE TAXES

Section 4401 of the Internal Revenue Code imposes an excise tax, in this case equal to .25% of every amount wagered, on "[e]ach person who is engaged in the busi-

ness of accepting wagers" or "who conducts any wagering pool or lottery." 26 U.S.C. 4401(a) and (c). Section 4411 of the Code imposes an occupational tax, in this case equal to $50 per person, on "each person who is liable for the tax imposed under section 4401 or who is engaged in receiving wagers for or on behalf of any person so liable." 26 U.S.C. 4411(a). Petitioners do not contest in this Court that each of these taxes applies, on its face, to a wagering or lottery business conducted by an Indian Tribe, and in particular to the sale of pull-tab cards by petitioners. The question presented is whether Section 20(d) of the Indian Gaming Regulatory Act, 25 U.S.C. 2719(d), nonetheless creates an exemption from these taxes in favor of petitioners and other Tribes.[3]

The federal wagering taxes also apply on their face to lotteries or wagering businesses conducted by States.

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[3] This case deals with excise taxes, not income taxes. Compare Rev. Rul. 67-284, 1967-2 C.B. 55, 58 (concluding that Indian Tribes are not taxable entities for purposes of the federal *income* tax); see also Pet. App. 12a-18a; S. Rep. No. 646, 97th Cong., 2d Sess. 8 (1982); H.R. Rep. No. 984, 97th Cong., 2d Sess. 15 (1982). Amici Seminole Tribe of Florida *et al.* argue (Br. 9-10) that Section 4401 does not apply to wagers placed with Tribes because tribal gaming is authorized by federal, not state, law, and amici San Manuel Band (*passim*) and San Carlos Apache Tribe (Br. 7-8) argue that the federal taxes do not apply because tribal gaming businesses are operated to support governmental functions, not for private profit. Neither of those arguments is germane to the question presented in this case. See Pet. i. In any event, the state-authorization argument fails for reasons set out by the Federal Circuit in *Little Six, Inc.* v. *United States*, 210 F.3d 1361, 1363-1364 (2000), petition for cert. pending, No. 00-1115 (filed Jan. 10, 2001) (see Pet. App. 104a-106a), and it suffices to observe that the "profit" argument would render superfluous the express tax exemption granted to state lotteries by Section 4402(3) of the Code—the very provision on which petitioners seek to rely.

Section 4402 of the Code, however, expressly exempts from taxation any wager placed with a state agency or agent "in a sweepstakes, wagering pool, or lottery which is conducted by an agency of a State acting under authority of State law." 26 U.S.C. 4402(3). Section 7871 of the Code in turn provides that, in transactions involving its "essential governmental function[s]," "[a]n Indian tribal government shall be treated as a State" for various specified federal tax purposes, including "for purposes of any exemption from * * * an excise tax imposed by" Chapters 31-33 and 36 of the Code (relating generally to special fuels, certain manufactured goods, communications services, and use of certain highway vehicles). 26 U.S.C. 7871(a)-(b). Section 7871 does not, however, apply to the federal wagering excise taxes, which are imposed by Chapter 35 of the Code (Sections 4401-4424). The Code itself does not, therefore, provide Tribes, as opposed to States, with any exemption from those taxes.

Petitioners accordingly rely instead on the IGRA, which Congress enacted in 1988 in order, among other purposes, "to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments." 25 U.S.C. 2702(1). Near the end of that Act, in a Section that otherwise deals with the Act's application to certain lands acquired in trust for Tribes after the Act's effective date, Congress provided that:

> The provisions of the Internal Revenue Code of 1986 (including sections 1441, 3402(q), 6041, and 6050I, and chapter 35 of such Code) concerning the reporting and withholding of taxes with respect to the winnings from gaming or wagering operations shall

> apply to Indian gaming operations conducted pursuant to this Act, or under a Tribal-State compact entered into under section 11(d)(3) [25 U.S.C. 2710(d)(3)] that is in effect, in the same manner as such provisions apply to State gaming and wagering operations.

IGRA § 20(d)(1), 102 Stat. 2486 (25 U.S.C. 2719(d)(1)). Petitioners argue that the IGRA's parenthetical reference to Chapter 35 of the Code confers on Tribes the same exemption from the tax imposed by Section 4401 of the Code that is extended to States by Section 4402. See *Little Six, Inc.* v. *United States*, 210 F.3d 1361 (Fed. Cir. 2000) (adopting that view), petition for cert. pending, No. 00-1115 (filed Jan. 16, 2001). That is not, however, a reasonable construction of Section 2719(d).

A. The Language Of The IGRA Does Not Exempt Tribes From The Wagering Excise Taxes

The operative language of 25 U.S.C. 2719(d) (IGRA § 20(d)) directs that all provisions of the Internal Revenue Code "concerning the reporting and withholding of taxes with respect to * * * winnings" are to apply to Tribes as they would to States. That language ensures that tribal gaming operations, like state operations, are required to report, withhold, and pay over to the IRS a specified percentage of any player's winnings over a certain amount, or of a nonresident alien player's winnings from certain games. See, *e.g.*, 26 U.S.C. 871(a)(1) and (j) (imposing tax on nonresident aliens), 1441(a) and (c)(11) (withholding of tax imposed on nonresident aliens), 3402(q) (withholding of tax on winnings above certain threshold amounts), 6011(a) (requirement to make return where tax has been withheld), 6041(a) (information returns with respect to

payments of $600 or more). It forecloses, for example, any argument, similar to one made by petitioners in the lower courts in this case (see Pet. App. 12a-18a), that a Tribe is not a "person" subject to those requirements. See, *e.g.*, 26 U.S.C. 3402(q)(1) (requiring withholding by "[e]very person, including * * * a State, * * * making any payment of winnings"). It also extends to Tribes any special rules applicable to States with respect to reporting or withholding of taxes on winnings, such as the higher amount that was necessary to trigger the withholding requirement under Section 3402(q) at the time that the IGRA was enacted.[4] Section 2719(d)'s language addressing "the *reporting and withholding* of taxes with respect to * * * [a player's] *winnings*" cannot, however, plausibly be read to extend to Code provisions concerning the *imposition* of excise taxes on a game operator's *receipts* or *employment*.

Petitioners' contrary argument rests, not on the operative language of Section 2719(d), but on the provision's parenthetical listing of illustrative examples: "(including sections 1441, 3402(q), 6041, and 6050I, and chapter 35 of such [Code])." Of the Sections listed in the parenthetical, Sections 1441, 3402(q), and 6041 are, as just noted, straightforward examples of "provisions * * * concerning the reporting and withholding of taxes" on winnings: Section 1441 deals with withholding tax from the income of nonresident aliens, Section 3402(q) with withholding from winnings

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[4] Under 26 U.S.C. 3402(q)(3) (1988), withholding generally applied to wagering or lottery proceeds greater than $1000, although in some cases only if the proceeds were at least 300 times the amount wagered. A state lottery was required to withhold, however, only when winnings exceeded $5000. In 1992 the withholding threshold was raised to $5000 for all types of proceeds. Energy Policy Act of 1992, Pub. L. No. 102-486, § 1942(a), 106 Stat. 3036.

exceeding certain threshold amounts, and Section 6041 with the filing of information returns by businesses with respect to payments of certain amounts, including certain gambling winnings, that may be taxable income in the hands of the recipient. Section 6050I requires every person who conducts a business to report any receipt of more than $10,000 in cash in a single transaction or group of related transactions. Cf. *Ratzlaf* v. *United States*, 510 U.S. 135 (1994) (involving prosecution under related provisions of Title 31). Chapter 35 of the Code, as also noted above, imposes the federal excise and occupational taxes on gaming operations and operators (not on winnings or players), and includes various ancillary provisions.

The Tenth Circuit characterized Section 2719(d)'s reference to Chapter 35 as "somewhat cryptic," because that Chapter bears no obvious relation to the reporting and withholding of taxes on wagering winnings—the domain to which Section 2719(d)'s operative text applies. Pet. App. 25a. The Court of Appeals for the Federal Circuit considered the reference "ambiguous" for the same reason. *Little Six*, 210 F.3d at 1365. We agree that "Chapter 35" is not a particularly apt example to use to illustrate the scope of the operative text.

The Tenth Circuit suggested that the illustrative reference to Chapter 35 could be harmonized with the operative text by noting that Chapter 35 includes definitions of the terms "wager" and "lottery." Pet. App. 25a. Although those definitions by their terms apply only "[f]or purposes of" Chapter 35 itself, see 26 U.S.C. 4421, they could perhaps be instructive in the interpretation of the Code's separate provisions dealing with gaming winnings—at least to the extent of ensuring that all forms of wagers and lotteries that fall

within the Chapter 35 definitions would also fall within the scope of the "gaming and wagering operations" to which Section 2719(d) refers, and from which winnings are to be reported and withheld under the more directly pertinent provisions of the Code.

Even apart from the court of appeals' suggested explanation of the illustrative reference to Chapter 35, that reference would not necessarily (or properly) be read to confer an exemption from federal excise taxes, as petitioners contend, merely because Chapter 35 contains a single provision conferring such an exemption on state lotteries. See I.R.C. § 4402(3). Nothing in the text of Section 2719(d) suggests that the reference was intended to invoke that exemption, rather than other provisions in Chapter 35 that deal with matters of tax administration, more akin to the "reporting and withholding" concerns with which Section 2719(d) expressly deals. See I.R.C. §§ 4403 (requiring persons liable for excise tax to keep daily records of gross amount of wagers), 4412 (requiring registration of persons subject to occupational tax).

Finally, even if Section 2719(d)'s reference to Chapter 35 of the Code simply could not be harmonized with the IGRA provision's operative language concerning the withholding and reporting of taxes on winnings, that circumstance would not justify reading the IGRA to create a federal tax exemption. While it is certainly preferable to give meaning to each word in a statute, see, *e.g.*, *Pennsylvania Dep't of Pub. Welfare* v. *Davenport*, 495 U.S. 552, 562 (1990), the text at issue here is merely one of a series of unexplained cross-references in an illustrative parenthetical. It cannot fairly be said to contradict limitations that inhere in the provision's central textual command. If a substantive statutory command and a parenthetical example are truly incon-

sistent, it is hard to imagine circumstances under which the command rather than the example should give way. Cf. *United States* v. *Monjaras-Castaneda*, 190 F.3d 326, 330 (5th Cir. 1999) ("[a] parenthetical is, after all, a parenthetical, and it cannot be used to overcome the operative terms of the statute") (quoting *Cabell Huntington Hosp., Inc.* v. *Shalala*, 101 F.3d 984, 990 (4th Cir. 1996)), cert. denied, 528 U.S. 1194 (2000). Certainly there are no such circumstances here. See *Little Six, Inc.* v. *United States*, 229 F.3d 1383, 1385 (Fed. Cir. 2000) (Dyk, J., dissenting from denial of rehearing en banc) ("It is far easier to make sense out of [Section 2719(d)] if the inconsistent specific examples are read out of the statute because they conflict with the limitation.").

To the contrary, it would be particularly inappropriate to allow Section 2719(d)'s passing reference to Chapter 35 to supersede its central limitation. What petitioners seek is not some marginal reduction in the applicability of the wagering-tax administrative requirements addressed by the IGRA, but a complete exemption from two entirely different federal excise taxes on petitioners' own gaming businesses. Courts are not free to infer federal tax exemptions: Congress must expressly grant them. See p. 24, *infra*. Whatever else may be said about Section 2719(d), it does not expressly grant petitioners, or other Indian Tribes, any exemption from the excise taxes imposed on their gaming businesses by Chapter 35.

B. The Legislative History Confirms That The IGRA Does Not Grant Tribes An Excise Tax Exemption

The history of Section 2719(d) confirms that conclusion. As originally proposed in the Senate, the bill

that became the IGRA included language that would indeed have exempted tribes from the federal wagering excise taxes:

> Provisions of the Internal Revenue Code of 1986, concerning *the taxation and* the reporting and withholding of taxes with respect to *gambling or wagering operations* shall apply to Indian gaming operations conducted pursuant to this Act the same as they apply to State operations.

S. 555, 100th Cong., 1st Sess. 37 (1987) (emphasis added). That language, however, was never enacted. The Senate Indian Affairs Committee instead made two critical changes, which are reflected in the language of the final Act: It deleted any reference to provisions "concerning the *taxation* * * * [of] wagering operations," and it added language specifically restricting the provision's scope so that Tribes would be treated as States only for purposes of Internal Revenue Code provisions "concerning the *reporting and withholding* of taxes with respect to *the winnings from* gaming or wagering operations." 25 U.S.C. 2719(d)(1) (emphasis added). It also added the illustrative parenthetical on which petitioners rely.

The Senate Report on the IGRA indicates simply that the provision "applies the Internal Revenue Code to *winnings from* Indian gaming operations"—a statement fully consistent with the enacted language. S. Rep. No. 446, 100th Cong., 2d Sess. 20 (1988) (emphasis added). It does not further explain the drafting changes. One might speculate that the Indian Affairs Committee could have deleted language that would have had the effect of conferring a tax exemption in order to avoid a possible jurisdictional conflict with the Finance Committee, or perhaps even with the House of

Representatives. Cf. *Armstrong* v. *United States*, 759 F.2d 1378, 1381-1382 (9th Cir. 1985) (bills reducing or increasing taxes must originate in the House); *Little Six*, 229 F.3d at 1385 (Dyk, J., dissenting from denial of rehearing en banc) (reciting history showing that precursor legislation, including an express exemption, originated in the House, while the bill that was ultimately enacted, in the next Congress, originated in the Senate). It is also possible that the particular seeming anomaly at issue here, the inclusion of Chapter 35 in the exemplary parenthetical, is simply an inadvertent vestige of some interim version of the bill, created during the committee's internal deliberations (but never published), that included both the examples and the express tax exemption. See *ibid.* ("The language of the provision has all the earmarks of a simple mistake in legislative drafting. The better explanation * * * is * * * that it was included inadvertently after Congress had decided to eliminate the reference to 'taxation.'").

Such speculation is not a firm basis for statutory interpretation. Here, only one confident conclusion can be drawn from the history of Section 2719(d): Deletion of the express exemption language from the original draft bill is strong evidence of Congress's intention not to allow such an exemption. See, *e.g.*, *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 442-443 (1987); *Gulf Oil Corp.* v. *Copp Paving Co.*, 419 U.S. 186, 200 (1974); see also *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145, 157 (1973) (noting that tax immunity provisions were dropped from bills before enactment of Indian Reorganization Act, 25 U.S.C. 461 *et seq.*). Certainly nothing in the Senate report, let alone in the enacted statutory language, suggests that the new, parenthetical language that emerged from the committee was intended to contradict, rather than to exemplify, the newly limited operative language—by providing Tribes with a shorthand version of the expressly exemptive language that the drafters had just considered and deleted.[5]

C. The Policy Of Encouraging Tribal Economic Development Does Not Permit Courts To Construe The IGRA To Confer A Tax Exemption That Congress Did Not Grant

Finally, the purposes and policies of the IGRA do not justify an inference of congressional intent to create a new excise tax exemption for Tribes, outside the Internal Revenue Code—certainly not in a parenthetical list of examples for a very different substantive proposition, and without any substantive discussion in the

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[5] Petitioners seek to rely (Br. 39-40) on a letter sent to the Commissioner of Internal Revenue in 1991, three years after enactment of the IGRA, in which Senator Inouye, then Chairman of the Indian Affairs Committee, sought to "advise" the Commissioner "that it was the intention of the Congress that the tax treatment of wagers conducted by tribal governments be the same as that for wagers conducted by state governments under Chapter 35." See Pet. App. 113a. In this case that "advi[ce]" is entitled to even less weight than might normally be accorded to a post-enactment statement by a single legislator (if that is possible), because it rests on a materially incorrect statement of the statutory language that it purports to explain. If Congress had enacted the language quoted in the Senator's letter (*ibid.*)—"[t]he provisions of the Internal Revenue Code of 1986 (including . . . chapter 35) shall apply to Indian gaming operations conducted pursuant to this Act . . . in the same manner as such provisions apply to State gaming and wagering operations"—this would be a very different case. That is not, however, the enacted language of Section 2719(d), and it never has been. Whatever its worth in other circumstances, therefore, the Senator's letter is of no value as an aid to construction of the actual statutory language.

legislative history. In *Little Six*, the Federal Circuit relied too heavily on the statutory policy of fostering tribal economic development and self-sufficiency in concluding that it should read Section 2719(d) to require treating Tribes as States for purposes of the excise tax exemption. Pet. App. 110a-111a. Although that goal is surely important, and is set out as a primary general purpose of the IGRA, see 25 U.S.C. 2702(1), it does not sweep all before it.[6] To the contrary, "[i]f federal courts were free to create federal tax exemptions for Indians based on policy alone, the federal policy of Indian economic advancement, implicit in almost all of the many federal enactments regarding Indians, would soon have the unintended effect of exempting all Indians from all federal taxation." *United States* v. *Anderson*, 625 F.2d 910, 917 (9th Cir. 1980), cert. denied, 450 U.S. 920 (1981); see also *Little Six*, 229 F.3d at 1385-1386 (Dyk, J., dissenting from denial of rehearing en banc) ("The fact that a statute confers a set of benefits on tribes cannot mean that the statute should be extended beyond its terms to grant additional benefits to the tribes.").

Congress can pass (indeed, has passed) legislation that seeks to encourage tribal economic development without exempting Tribes from all federal taxes, or always treating Tribes in the same way that it treats

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[6] Nor is it the only purpose that motivates the IGRA. As the Act itself makes clear, Congress was also concerned to provide a federal statutory framework for the regulation of tribal gaming enterprises, to combat organized crime, to ensure that gaming benefits flowed primarily to Tribes, and "to assure that gaming is conducted fairly and honestly by both the operator and players." See 25 U.S.C. 2702(2)-(3); *Shakopee Mdewakanton Sioux Cmty.* v. *Hope*, 16 F.3d 261, 265 (8th Cir. 1994); S. Rep. No. 446, *supra*, at 1-4.

States. As noted above, Congress has provided targeted tax support for tribal development through Section 7871 of the Internal Revenue Code, which was added by the Indian Tribal Governmental Tax Status Act of 1982, Pub. L. No. 97-473, § 202(a), 96 Stat. 2608. See also S. Rep. No. 646, 97th Cong., 2d Sess. 11 (1982) (Act was intended to "facilitate [the] efforts of the Indian tribal governments" to "assist their people by stimulating their tribal economies and by providing governmental services."). Section 7871 grants Tribes the benefit of, among other things, some of the excise tax exemptions enjoyed by States—but only with respect to certain taxes, and only to the extent that a particular transaction "involves the exercise of an essential governmental function of the Indian tribal government." 26 U.S.C. 7871(a)(2) and (b) (set out at App., *infra*, 1a-4a); see S. Rep. No. 646, *supra*, at 11-13. The taxes subject to express exemption under Section 7871 do not include the gaming excise taxes. See 26 U.S.C. 7871(a)(2); Rev. Rul. 94-81, 1994-2 C.B. 412. Nor does the Code extend to Tribes the express exemption from the gaming taxes that Section 4402(3) accords to state-run "sweepstakes, wagering pool[s], or lotter[ies.]"

If, at the time it enacted the IGRA, Congress had wished to extend that exemption to Tribes, it could easily have availed itself of either of these existing frameworks within the Code. As it stands, however, both before and after the IGRA, Section 4402 provides an express exemption from the gaming taxes, but not to Tribes; and Section 7871 treats Tribes as States for purposes of express exemption from various excise taxes, but not the gaming taxes. Against that background, Section 20(d) of the IGRA, 25 U.S.C. 2719(d), cannot plausibly be construed to pursue general policies

of tribal development by conferring a federal excise tax exemption on Tribes, through a "cryptic" cross-reference (see Pet. App. 25a) in a parenthetical that in terms merely illustrates an operative provision that deals with distinctly different subject matter.

D. The Canon That Ambiguities Should Be Resolved In Favor Of Indian Interests Does Not Call For A Different Result In This Case

Recognizing that the statutory basis for their claim to a tax exemption is doubtful at best, petitioners rest their case squarely on the proposition that "ambiguity in an Indian-law-related federal statute is to be liberally construed in favor of tribal interests." Pet. Br. 12 (capitalization and emphasis omitted). While we agree with petitioners that that canon of construction is "eminently sound and vital" (Br. 34) where it properly applies, in this case petitioners seek to "place[] more weight on the canon * * * than [it] can bear." *Little Six*, 229 F.3d at 1386 (Dyk, J., dissenting from denial of rehearing en banc).[7]

The principle of resolving ambiguity in favor of Indian interests has its origin and core application in cases involving the interpretation or abrogation of Indian treaties or treaty rights. See, *e.g.*, *County of Oneida, New York* v. *Oneida Indian Nation*, 470 U.S. 226, 247-248 (1985); *Jones* v. *Meehan*, 175 U.S. 1, 11-12 (1899); *Choctaw Nation* v. *United States*, 119 U.S. 1, 27-28 (1886). The canon extends as well to the interpretation of federal enactments pertaining to Indian Tribes, see *County of Yakima* v. *Confederated Tribes & Bands*

[7] Indeed, for reasons we have explained, the parenthetical reference to Chapter 35 on which petitioners rely is perhaps more accurately described as a "mystery" rather than an "ambiguity."

of the Yakima Indian Nation, 502 U.S. 251, 269 (1992), and this Court has invoked it in considering whether general language in an Indian statute sufficed to exempt from federal tax certain otherwise taxable income that had been derived from Indian trust lands. *Squire* v. *Capoeman*, 351 U.S. 1, 6-7 (1956).[8] If Section 2719(d) were genuinely susceptible of the construction that petitioners seek to place on it, it might be appropriate for the Court to take into account this principle of generous construction.

But even if it applied, the Indian canon would not simply dictate resolution of the case in petitioners' favor, as petitioners seem to suggest (Br. 21-27). "Canons of construction need not be conclusive and are often countered, of course, by some [other] maxim

[8] In *Squire*, the Court analyzed the structure and purposes of the Indian General Allotment Act; a proviso in the 1906 amendment to the Act; legislative history; and a series of "relatively contemporaneous official and unofficial writings," and concluded that Congress intended to exempt certain Indians from tax on gains from the sale of timber from a restricted allotment (*i.e.*, land allotted to an Indian, title to which was held in trust by the United States for a specified period, during which the land was subject to restrictions on alienation and encumbrance). The Court reasoned that the language of the original Act might be ambiguous on the point, but that the import of the "literal language" of the 1906 proviso "evince[d] a congressional intent" that the income would not be taxable until the government removed the restrictions from the land. 351 U.S. at 6-9. *Squire* reflects the proper practice of using traditional tools of statutory construction to reach a result consistent with congressional intent, rather than relying reflexively on any particular canon of construction. See also *Mescalero*, 411 U.S. at 156 (citing *Squire* as support for the proposition that "tax exemptions are not granted by implication," a rule applied "to taxing acts affecting Indians as to all others," and that an exemption "cannot rest on dubious inferences") (quoting *Oklahoma Tax Comm'n* v. *United States*, 319 U.S. 598, 606-607 (1943)).

pointing in a different direction." *Circuit City Stores, Inc.* v. *Adams*, 121 S. Ct. 1302, 1309 (2001). Here, the Court would, at a minimum, have to balance the Indian canon against the countervailing principle, also recognized in *Squire*, that exemptions from federal taxation must be expressly stated, and may not simply be inferred by the courts from unclear statutory language. See *Squire*, 351 U.S. at 6 ("We also agree that, to be valid, exemptions to tax laws should be clearly expressed."). That principle has long been a touchstone of federal tax law, and it is as venerable in that critically important sphere as the Indian canon is in the realm of Indian law. See, *e.g.*, *United States* v. *Wells Fargo Bank*, 485 U.S. 351, 354-355 (1988); *United States Trust Co. of New York* v. *Helvering*, 307 U.S. 57, 60 (1939). Indeed, this Court has long disfavored implied exemptions in cases involving both income and excise taxation of Indians. See *Superintendent of Five Civilized Tribes* v. *Commissioner*, 295 U.S. 418, 421 (1935) (no exemption for surplus income from allotted land, where no law "expresses definite intent to exclude [it] from taxation"); *Choteau* v. *Burnet*, 283 U.S. 691, 693-694, 696-697 (1931) (Indian who had received federal "certificate of competency" was thenceforth liable for federal income tax in the absence of any express statutory exemption; "[t]he intent to exclude must be definitely expressed, where, as here, the general language of the Act laying the tax is broad enough to include the subject matter."); *The Cherokee Tobacco*, 78 U.S. (11 Wall.) 616, 618, 620 (1870) (federal excise tax on tobacco "within the exterior boundaries of the United States" applied to Indians within the territory of the Cherokee Nation; language was broad enough to encompass Indians, and any intended exemption "would doubtless have been expressed").

Petitioners seek (Br. 15-21) to counter reliance on the anti-exemption principle by quoting this Court's statement that that "although tax exemptions generally are to be construed narrowly, in 'the Government's dealings with the Indians the rule is exactly the contrary. The construction, instead of being strict, is liberal.'" *Montana* v. *Blackfeet Tribe*, 471 U.S. 759, 766 n.4 (1985) (quoting *Choate* v. *Trapp*, 224 U.S. 665, 675 (1912)). The citation is inapt, however, because *Montana*, *Choate*, and the other cases on which petitioners rely (with the exception of *Squire*, discussed above) all involved the very different context of *state* taxation of Indians or Tribes.[9] In that context, this Court, cognizant of "the unique trust relationship between the United States and the Indians," *County of Oneida*, 470 U.S. at 247, has made clear that "first, the States may tax Indians only when Congress has manifested clearly its consent to such taxation; [and] second, statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *Montana*, 471 U.S. at 766 (citation omitted); see also *Oklahoma Tax Comm'n* v. *Chickasaw Nation*, 515 U.S. 450, 455, 458 (1995).

The situation is very different, however, in federal taxation cases such as this one. Unlike state governments, Congress has plenary authority to legislate over Indian affairs, and that authority unquestionably includes the power to impose federal taxes. See *Choteau*,

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[9] In *Choate*, moreover, unlike in this case, there was no dispute that the relevant statute contained an express exemption. The issue was whether that exemption conferred a property right protected by the Fifth Amendment. 225 U.S. at 671; see also *Carpenter* v. *Shaw*, 280 U.S. 363 (1930).

283 U.S. at 697.[10] Historically, moreover, the Tribes' legal and practical relationship to the federal government has been entirely different from their relationship to the governments of the States. See, *e.g.*, *United States* v. *Kagama*, 118 U.S. 375, 383-385 (1886); *McClanahan* v. *Arizona State Tax Comm'n*, 411 U.S. 164, 168 (1973) ("The policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history.") (quoting *Rice* v. *Olson*, 324 U.S. 786, 789 (1945)). The Court has frequently relied on the unique nature of that relationship to require clear congressional consent to state taxation, as well as clear expression of congressional intent to abrogate Indian treaty rights.[11] The Court has not, however, required that Congress speak with the same clarity in order to bring Indians or Tribes within the coverage of general federal tax laws. See *Superintendent of Five Civilized Tribes*, 295 U.S. at 419-420 (rejecting rule in *Chouteau* v. *Commissioner*, 38 F.2d 976, 977 (10th Cir.), cert. denied, 281 U.S. 759 (1930), that federal income tax laws must manifest a specific intent to apply to Indians). To the contrary, where a federal tax statute is broad enough to cover the subject matter, any exemption for Indians "must be definitely expressed."

[10] As to Congress's plenary authority, see, *e.g.*, U.S. Const. Art. I, § 8, Cl. 3; *id.* Art. II, § 2, Cl. 2; *Montana*, 471 U.S. at 764-765; *County of Oneida*, 470 U.S. at 234; *White Mountain Apache Tribe* v. *Bracker*, 448 U.S. 136, 142 (1980); *Morton* v. *Mancari*, 417 U.S. 535, 551-552 (1974).

[11] See, *e.g.*, *County of Oneida*, 470 U.S. at 247 (quoting *Washington* v. *Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 690 (1979)); *Solem* v. *Bartlett*, 465 U.S. 463, 470 (1984) (diminishment of reservation boundaries); *United States* v. *Santa Fe Pac. R.R.*, 314 U.S. 339, 346 (1941) (extinction of land title).

Superintendent of Five Civilized Tribes, 295 U.S. at 419-420 (quoting *Choteau*, 283 U.S. at 696-697); see also *Squire*, 351 U.S. at 6; *The Cherokee Tobacco*, 78 U.S. (11 Wall.) at 620.

In any event, this case does not resolve itself into a duel between competing canons of statutory construction—that favoring Indians, on the one hand, and that disfavoring implied tax exemptions, on the other. Such special canons are properly applied only after, or at least alongside, the central traditional tools of statutory interpretation (themselves the primary "canons"): close examination of the statute's language, history, and motivating purposes or legal context. See, *e.g.*, *Hagen* v. *Utah*, 510 U.S. 399, 410-411 (1994); *Connecticut Nat'l Bank* v. *Germain*, 503 U.S. 249, 253-254 (1992).[12] In this case, although there is doubt concerning exactly how Section 2719(d)'s reference to Chapter 35 may be given effect as an example of a provision "concerning the reporting and withholding of taxes with respect to [players'] winnings" from tribal gaming operations, there is no doubt that the latter operative language cannot properly be construed to confer on Tribes an exemption from their own federal excise taxes. See pp. 12-22, *supra*. Thus, application of

[12] See also, *e.g.*, Pet. Br. 15 n.5 (quoting *Citizens' Bank* v. *Parker*, 192 U.S. 73, 85-86 (1904)); cf. *Whitman* v. *American Trucking Ass'ns*, 121 S. Ct. 903, 911 (2001) (doctrine of constitutional doubt); *Lindh* v. *Murphy*, 521 U.S. 320, 324-326 (1997) (presumption against retroactivity); *Reno* v. *Koray*, 515 U.S. 50, 64-65 (1995) (rule of lenity); *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 n.9 (1984) (deference to administrative interpretation).

the basic tools of interpretation leaves no remaining scope for petitioners' reliance on the Indian canon.[13]

Although special canons of construction are often useful tools, like other such tools they are properly used to help resolve genuine interpretive ambiguity, not to create doubt about an interpretation where none would otherwise exist. See *Connecticut Nat'l Bank*, 503 U.S. at 253-254; cf. *Ratzlaf*, 510 U.S. at 147-148 ("[W]e do not resort to legislative history to cloud a statutory text that is clear."). The Indian canon cannot justify interpretation of Section 2719(d) in a manner that cannot be reconciled with its language and history—the most basic tools of interpretation, and the best indicators of congressional intent. See, *e.g.*, *South Carolina* v. *Catawba Indian Tribe*, 476 U.S. 498, 506 & n.16 (1986) (canon "does not permit reliance on ambiguities that do not exist"); *DeCoteau* v. *District County Court*, 420 U.S. 425, 447 (1975); *Hagen*, 510 U.S. at 411-412, 421; *Cotton Petroleum Corp.* v. *New Mexico*, 490 U.S. 163, 177-178 (1989); *Oregon Dep't of Fish & Wildlife* v. *Klamath Indian Tribe*, 473 U.S. 753, 774 (1985); *Rice* v. *Rehner*, 463 U.S. 713, 732-733 (1983). Accordingly, the court of appeals correctly held in this case that Sections 4401 and 4411 of the Internal Revenue Code apply to

[13] Moreover, the same considerations that make it unnecessary to resolve this case as a contest between dueling canons of construction also indicate that, if a court were to reach the question, the canon disfavoring implied tax exemptions would prevail over the Indian canon under the particular circumstances of this case. Indeed, petitioners scarcely contest that the government has much the better of the statutory argument using the primary tools of construction. See Pet. Br. 29 n.16 ("Here, the face of the statute and the legislative history do not clearly demonstrate that the construction of § 2719(d)(1) proffered by the Petitioner Nations is incorrect.").

petitioners' gaming operations, and that petitioners enjoy no exemption from the federal excise taxes so imposed.

CONCLUSION

The judgments of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

Section 7871 of the Internal Revenue Code of 1986, 26 U.S.C. 7871, as added by the Indian Tribal Governmental Tax Status Act of 1982, Pub. L. No. 97-473, Tit. II, 96 Stat. 2607, and subsequently amended, provides in part as follows:

§ 7871. Indian tribal governments treated as States for certain purposes

(a) General rule.—

An Indian tribal government shall be treated as a State—

(1) for purposes of determining whether and in what amount any contribution or transfer to or for the use of such government (or a political subdivision thereof) is deductible under—

(A) section 170 (relating to income tax deduction for charitable, etc., contributions and gifts),

(B) sections 2055 and 2106(a)(2) (relating to estate tax deduction for transfers of public, charitable, and religious uses), or

(C) section 2522 (relating to gift tax deduction for charitable and similar gifts);

(2) subject to subsection (b), for purposes of any exemption from, credit or refund of, or

payment with respect to, an excise tax imposed by—

(A) chapter 31 (relating to tax on special fuels),

(B) chapter 32 (relating to manufacturers excise taxes),

(C) subchapter B of chapter 33 (relating to communications excise tax), or

(D) subchapter D of chapter 36 (relating to tax on use of certain highway vehicles);

(3) for purposes of section 164 (relating to deduction for taxes);

(4) subject to subsection (c), for purposes of section 103 (relating to State and local bonds);

(5) for purposes of section 511(a)(2)(B) (relating to the taxation of colleges and universities which are agencies or instrumentalities of governments or their political subdivisions);

(6) for purposes of—

(A) section 105(e) (relating to accident and health plans),

(B) section 403(b)(1)(A)(ii) (relating to the taxation of contributions of certain employers for employee annuities), and

(C) section 454(b)(2) (relating to discount obligations); and

(7) for purposes of—

(A) chapter 41 (relating to tax on excess expenditures to influence legislation), and

(B) subchapter A of chapter 42 (relating to private foundations).

(b) Additional requirements for excise tax exemptions

Paragraph (2) of subsection (a) shall apply with respect to any transaction only if, in addition to any other require-ment of this title applicable to similar transactions involving a State or political subdivision thereof, the transaction in-volves the exercise of an essential governmental function of the Indian tribal government.

* * * * *

(d) Treatment of subdivisions of Indian tribal governments as political subdivisions

For the purposes specified in subsection (a), a sub-division of an Indian tribal government shall be treated as a political subdivision of a State if (and only if) the Secretary determines (after consultation with the Secretary of the Interior) that such subdivision has been delegated the right to exercise one or more of the substantial

governmental functions of the Indian tribal government.

(e) Essential governmental function

For purposes of this section, the term "essential governmental function" shall not include any function which is not customarily performed by State and local governments with general taxing powers.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

THE CHICKASAW NATION and
THE CHOCTAW NATION OF OKLAHOMA,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF ON THE MERITS FOR PETITIONERS

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PROPOSITION ONE

THE GOVERNMENT HAS NOT REBUTTED THE NATIONS' SHOWING THAT EVEN IN CASES IN WHICH A FEDERAL TAX EXEMPTION IS IN ISSUE, THE INDIAN-LAW CANONS OF CONSTRUCTION MANDATE CONSTRUCTION OF TEXTUALLY-AMBIGUOUS INDIAN-LAW-RELATED FEDERAL STATUTES IN THE MANNER MOST FAVORABLE TO TRIBAL INTERESTS ABSENT CLEAR LEGISLATIVE HISTORY SUPPORTING A CONTRARY CONCLUSION.

A. The Government Has Through Silence Conceded Two of Petitioners' Canons-Related Contentions.

The Nations essentially made four points with reference to the canons in their opening brief. *First*, the Nations demonstrated that the deeply-rooted Indian-law canons mandate the construction of ambiguous federal statutes in the manner most favorable to tribal interests unless clear legislative history compels a contrary conclusion. Pet. Br. 12-14. *Second*, the Nations established that Congress specifically intended that those principles apply to the construction of the Indian Gaming Regulatory Act [IGRA]. *Id.* at 14. *Third*, the Nations demonstrated that the general tax-exemption maxim on which the Government relies is weak as a relative matter, and that although this Court has sometimes described it as requiring an unambiguous statement to *create* a tax exemption (and has occasionally said so — in dictum — even in Indian-law cases), in none of its cases has this Court held the general tax-exemption maxim to supersede the Indian-law canons in a case involving an *actual textual ambiguity*. *Id.* at 15-27. *Fourth*, the Nations pointed to case law from this Court demonstrating that the first and third interpretive principles apply no differently in cases involving asserted tribal immunities from *federal* taxation than they do in cases involving federal-authorization-of-*state* taxation

issues. *Id.* at 17-20. While the Nations will confront directly the responses that the Government does make, a few brief observations about what the Government does *not* contest may help to contextualize the "canons" issues at this stage of the litigation.

First, the Government does not deny that this Court's Indian-law canons require that:

> When we are faced with these two **possible** constructions, our choice between them must be dictated by a principle rooted in this Court's Indian jurisprudence: "[S]tatutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit."

County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation, 502 U.S. 251, 269 (1992) (emphasis added) (citation omitted). *Compare* Pet. Br. 13-14, *with* Resp. Br. *passim*.

Second, the Government has conceded through silence the Nations' contention that not only was Congress *constructively* aware of the Indian-law canons in the IGRA drafting process, but that it affirmatively intended those canons to control ambiguous provisions of that Act. *Compare* Pet. Br. 14, *with* Resp. Br. *passim*.

But the Government *does* take issue with two of the Nations' contentions that focus exclusively on the canons. The first concerns the hierarchy of the particular Indian-law canon at issue *vis-à-vis* the general tax-exemption maxim (and in the latter case, its precise contours); the second challenges the interchangeability of federal-tax exemption and federal-authorization-of-state-taxation case law for Indian-law canons purposes. The Nations will now demonstrate that the Government has made no headway on those points.

B. The Government's Attempt to Rebut the Primacy Of The Indian-Law Canon Over The General Tax-Exemption Maxim In Cases Involving Actual Textual Ambiguity Fails.

With respect to the relative positioning of: (1) the relevant Indian-law canon; (2) the general tax-exemption maxim; and (3) what the Government characterizes as the "traditional tools" of statutory construction, careful examination of the Government's brief will reveal that it has simply failed to effectively engage (and in some instances to engage at all) the Nations' detailed analysis of a century of this Court's case law.

Initially, the Government admits that the particular canon at issue is "eminently sound and vital," Resp. Br. 22, and that it at least "might" be applicable if 25 U.S.C. § 2719(d)(1) were "genuinely susceptible of the construction Petitioners seek to place on it," Resp. Br. 23. By agreeing to those propositions without having challenged this Court's *County of Yakima* standard, *see supra* at 2 (quoting same), the Government has effectively agreed that the canon should be employed if the Nations' proffered construction is *possible*[1] — at least (in its view) after applying the other so-called "traditional tools." The Nations will demonstrate in Proposition Two both that the construction advanced by the Nations, the Federal Circuit[2] and IGRA's primary Senate

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1. As a related matter, the Government's assertion that Petitioners "scarcely contest" that the Government has the better of the "traditional tools" argument — *based on Petitioners' phraseology of the issue under the burden that Petitioners maintain they must meet*, *see* Resp. Br. at 28 n.13 — is nothing more than a *non sequitur*, and a counter-factual one at that.

2. *Little Six, Inc. v. United States*, 210 F.3d 1361 (Fed. Cir. 2000).

author is "possible," and that the "traditional tools" do not clearly resolve the textual ambiguity in the Government's favor.[3]

However, it is the Government's attempt to exalt the general tax-exemption maxim at the expense of the relevant Indian-law canon that most patently demonstrates the Government's profound failure to come to grips with the Nations' careful doctrinal analysis. Even a cursory comparison of the treatment afforded to the relevant case law by the parties will quickly reveal the extent to which the Government simply repeats general arguments and citations that Petitioners have already specifically rebutted in detail. *Compare* Pet. Br. 15-27, *with* Resp. Br. 22-27.[4]

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3. Because the Nations will make such a showing, the Government's reference to *Ratzlaf v. United States*, 510 U.S. 135 (1994), *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249 (1992), and *South Carolina v. Catawba Indian Tribe*, 476 U.S. 498 (1986), *see* Resp. Br. 28, is unavailing. It cannot be legitimately claimed, as a purely textual matter, either that Section 2719(d)(1) is "clear," *Ratzlaf*, 510 U.S. at 147-48, or that the Nations seek to rely on "ambiguities that do not exist," *Catawba*, 476 U.S. at 506 n.16.

4. For example, the Government incorrectly implies that tax-exemptions in favor of Indian tribes can never arise from textual ambiguity. Resp. Br. 16. As *Choate v. Trapp*, 224 U.S. 665 (1912), *Squire v. Capoeman*, 351 U.S. 1 (1956), *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164 (1973), *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973), and *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759 (1985), confirm, the Government is wrong. *See* Pet. Br. 15-21. For almost a century this Court has applied the relevant Indian-law canon to the textual ambiguity of federal statutes that arguably create exemption for Indians from both federal and state taxation, the general tax-exemption maxim notwithstanding.

C. The Government's Attempt For Canons Purposes To Distinguish This Court's Tribal-Immunity-From-Federal-Taxation Authority From Its Federal-Consent-To-State-Taxation Authority Also Fails.

In establishing the primacy of the particular Indian-law canon over the general tax-exemption maxim in cases of textual ambiguity, the Nations developed two lines of argument. First, they proffered a precedent-based approach, noting, for example, that in *Squire v. Capoeman*, 351 U.S. 1 (1956), which dealt with an asserted tribal exemption from *federal* taxation, this Court invoked its *state*-taxation "canon" case law, *see id.* at 6-7 (quoting *Carpenter v. Shaw*, 280 U.S. 363, 367 (1930)), as fully interchangeable. Pet. Br. 18-19. Moreover, the Nations then noted that this Court has subsequently cited *Squire* in federal-authorization-of-*state* taxation cases, Pet. Br. 19-20 & nn.7, 8 (citing *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 175-76 (1973), and *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 155-56 (1973)), thus demonstrating that the interchangeability of the case law is complete, and that it operates in both directions.

Second (and perhaps equally fundamentally), having noted that the Indian-law canons are federal-trust-responsibility based, Pet. Br. 13-14, the Nations pointed to this Court's *specific* application of a subspecies of the trust-responsibility policy to tribal assertion of *federal* tax exemption based on ambiguous statutory language. *Id.* at 19 (quoting *Squire*, 351 U.S. at 8: "*[I]t is not lightly to be assumed that Congress intended to tax the ward for the benefit of the guardian.*" (emphasis added)). *See also id.* at 19 n.7 (citing additional authority in support of the quoted proposition).

Although the Government attempts to reply to both the precedent-based and policy-based assertions of the Nations, its efforts misfire. As to the precedent-based approach, the

Government can do little more than attempt to distinguish *Squire* as merely a "traditional tools" case, *see* Resp. Br. 23 & n.8, while perhaps failing to fully apprehend either: (1) that the Nations do not dispute the relevance of such tools where they *clearly* resolve textual ambiguity, *e.g.*, Pet. Br. 12 (Petitioners' Proposition I); or (2) that in *Squire*, this Court found a residual unresolved ambiguity, invoked the canon relied upon by the Nations, and rejected precisely the approach now tendered by the Government to this Court, *see* Pet. Br. 18 (quoting *Squire*).

On the Nations' "policy" (*i.e.*, trust-relationship) point, the Government notes that the specific subspecies of the general trust-responsibility policy that supports the Indian-law canons as a whole differs slightly in the federal-authorization-of-state-taxation arena[5] from the specific subspecies of that general policy on which this Court grounded the canons' applicability to the federal-tax-exemption context in *Squire*. Resp. Br. at 25-26. But the Government's observations in no way undermine this Court's independently-dispositive pronouncements: (1) that the *general* trust-relationship notion that supports the Indian-law canons *as a cumulative matter* remain "eminently sound and vital," *see* Pet. Br. 14 (citing *Bryan v. Itasca County*, 426 U.S. 373, 392 (1976)); and (2) that a powerful *subspecies* of trust-relationship policy *independently* supports the specific applicability of those canons to statutorily-grounded tribal exemption from *federal* taxation, *supra* at 5 (quoting *Squire*). Against that backdrop, the Government's ultimately irrelevant observation that the subspecies of trust-responsibility policy that provides redundant support for the

5. In the federal authorization-of-state-taxation context, the Government notes that the relevant subspecies of general trust-responsibility policy is "leaving Indians free from state jurisidction and control. . . ." Resp. Br. 26 (quoting *McClanahan v. Arizona Tax Commission*, 411 U.S. 164, 168 (1973)).

canons' applicability to state-taxation authorizations is *different* from the one that provides redundant support for their applicability to federal tax exemptions falls well wide of the mark.

PROPOSITION TWO

THE GOVERNMENT HAS NOT MET ITS BURDEN OF DEMONSTRATING EITHER THAT 25 U.S.C. § 2719(d)(1) IS TEXTUALLY UNAMBIGUOUS, OR THAT THE LEGISLATIVE HISTORY OR PURPOSES OF IGRA CLEARLY RESOLVE THE TEXTUAL AMBIGUITY IN ITS FAVOR.

A. The Government Does Not Deny That 25 U.S.C. § 2719(d)(1) Is Facially Ambiguous.

Petitioners' showing of the textual ambiguity in Section 2719(d)(1) remains unrebutted by the Government. Although the Government goes to great lengths to avoid directly admitting that textual ambiguity, nowhere in its brief does the Government actually deny the ambiguity.[6] Likewise, the Government does not, and cannot, state that the provision is unambiguous. That refusal to crisply join the issue speaks volumes.

6. The Government's efforts to avoid conceding the ambiguity include: ". . . the parenthetical reference to Chapter 35 on which Petitioners rely is perhaps more accurately described as a 'mystery' rather than an 'ambiguity', " Resp. Br. 22 n.7; "[t]he Court of Appeals for the Federal Circuit considered the reference 'ambiguous' for the same reason. *Little Six*, 210 F.3d at 1365. We agree that 'Chapter 35' is not a particularly apt example to use to illustrate the scope of the operative text," Resp. Br. 14; ". . . the text at issue here is merely one of a series of unexplained cross-references in an illustrative parenthetical," Resp. Br. 15; and four references to Section 2719(d)(1) as "cryptic," Resp. Br. 8, 9, 14, 22.

B. The Government's Attempts To Demonstrate That 25 U.S.C. § 2719(d)(1) Is Not "Genuinely Susceptible" To The Nations' Construction Are Unavailing.

1. The Nations' construction of 25 U.S.C. § 2719(d)(1) is not only "possible," but also gives effect to every word of that provision.

The Government incorrectly contends that Section 2719(d)(1) is not "genuinely susceptible" to the construction made by the Federal Circuit and Senator Inouye[7] and urged by

7. Rather than addressing the substance of the Nations' reasoning (and supporting authority) as to why the statement of Congressional intent by IGRA's primary Senate author should be given interpretive weight, *see* Pet. Br. 38-40 n.25, the Government instead seeks to deflect the impact of Senator Inouye's statement because in referencing § 2719(d)(1), his letter omitted an ellipsis. *See* Resp. Br. 19 n.5. That omission should in no way diminish the force of the Chairman's statement earlier in his letter that Congress intended "that the tax treatment of wagering conducted by tribal governments be the same as that for wagers conducted by state governments under Chapter 35 of the Internal Revenue Code" and that

> [b]ecause the purpose of wagers for both tribal and state governments is to provide for the general welfare of their citizens, it was the view of the Congress that to impose a higher rate [of taxation] upon tribal government-conducted gaming activities [than that imposed upon state government-conducted gaming activities] would be unfair.

Letter from Sen. Daniel Inouye, Chairman, Senate Select Committee on Indian Affairs, to Hon. Fred T. Goldberg, Jr., Commissioner, Internal Revenue Service, Dec. 12, 1991. App. p. 112a (bracketed material added). Senator Inouye's statement of congressional intent is completely consistent with the Nations' construction of (and giving effect to) every word of Section 2719(d)(1), including those elided words omitted from the quotation in the Chairman's letter. It is that consistency, along with the author's status as IGRA's primary author, that gives value to his remarks concerning congressional intent.

the Nations. *See* Resp. Br. 23. The careful reading of each word of the statutory text confirms that the Nations' construction, at the very least, meets (and in reality exceeds) the "possible construction" standard of *County of Yakima* for application of the relevant Indian-law canon in the Nations' favor.

Section 2719(d)(1) provides as its general subject "the provisions of the Internal Revenue Code of 1986" that "shall apply to Indian gaming operations" . . . "in the same manner as such provisions apply to state gaming and wagering operations." The statutory text narrows that general subject by operative language that can easily be read as identifying the *two* parts of the general subject to be made applicable to tribal gaming, as the additions of bracketed letters (to facilitate the illustration) demonstrate:

> . . . **concerning** [a] the reporting and withholding of taxes with respect to the winnings from gaming **or** [b] wagering operations . . .

25 U.S.C. § 2719(d)(1) (emphasis added and bracketed material added.)

That reading of the text, turning on the words "concerning" and "or," gives meaning not only to *every* word of the statute, including each word of the parenthetical phrase containing IRC Chapter 35, but also explains the exact placement of the parenthetical phrase as a descriptive modifier immediately after the general subject.[8] By using the disjunctive "or," Congress can be said to have divided into two parts those provisions of the IRC which it made applicable to Indian gaming — (a) those IRC provisions concerning reporting and withholding of taxes with respect to winnings by players, and (b) those IRC provisions

8. *See, e.g., United States v. Monjaras-Casteneda*, 190 F.3d 326, 329 (5th Cir. 1999) (explaining a parenthetical placed directly after a word as descriptive rather than limiting).

concerning the wagering operation itself. "Or" emphasizes the separate natures of those two applicable portions of the IRC. Each of the parenthetical phrase's constituents fits into either the first or the second group. IRC Sections 1441, 3402(q), and 6041 each deal with reporting and withholding of winnings. The last two parenthetical constituents, IRC Section 6050I and Chapter 35 (separated from the prior three IRC Sections by the significant word "and"), while having nothing to do with the reporting and withholding of winnings, do in fact apply to wagering operations[9] — that second part of the IRC expressly made applicable to Indian gaming by Section 2719(d)(1).[10]

The Nations' construction of the statute reads no words or phrases out of the congressional text as "surplusage." Particularly, the construction gives vitality to each specific provision of the IRC contained in the parenthetical phrase,

9. IRC Section 6050I requires not that the wagering operation report payments made *to* winning players, but rather that the wagering operation report payments to it *by* players. *See* Resp. Br. 14. Likewise, no doubt exists that IRC Chapter 35 applies to wagering operations.

10. The Government's argument that the Nations' construction is not possible should be rejected, among other reasons, as based on a false premise. Throughout that argument, the Government omits from its consideration Section 2719(d)(1)'s operative statutory language "or wagering operations." *See* Resp. Br. 7, 12, 15. By so doing, the Government makes an incomplete analysis on the erroneous basis that Section 2719(d)(1) contains only one "central textual command." *See* Resp. Br. 8, 14. As the Nations have shown, the complete statutory text actually contains *two* "central textual commands." Each parenthetical example can be read to illustrate one or the other textual command. Having begun with a false premise that relies on the irrelevance of the independent clause "or wagering operations," *cf.* Resp. Br. 12, 13, 27 (selectively quoting from the text of Section 2719(d)(1)), the Government wrongly draws the false conclusion that the textual references to IRC Section 6050I and Chapter 35 should be read out of Section 2719(d)(1) as aberrational.

rather than erasing some provisions as the Government urges. The construction recognizes the separation of the first three IRC provisions (dealing with winnings) from the last two (dealing with wagering operations) made by the use of "and" within the parenthetical. Only that reading uses the parenthetical phrase for its proper purpose — a descriptive modifier of the subject of the statute (those provisions of the IRC that shall apply to Indian gaming operations). Only the Nations' approach explains the location of the parenthetical after the general subject. Only that construction makes sense of (and gives effect to) the use of "or," and thereby prevents "wagering" (which that disjunctive "or" separates from "gaming") from becoming redundant surplus.

The Nations' review of Section 2719(d)(1)'s text, on which the Government primarily stakes its claim of no exemption, more than demonstrates that the text supports the Nations' **possible construction**. That showing effectively rebuts the Government's assertion that Section 2719(d)(1) is "not generally susceptible" to the Nations' construction, and satisfies (and in reality exceeds) the *County of Yakima* standard for application of the Indian-law canon in the Nations' favor.

2. The constructions of 25 U.S.C. § 2719(d)(1) proffered by the Government not only fail to diminish the "possibility" of the Nations' construction, but also are not credible.

The Government's ill-founded attempts to "explain away" the inclusion of IRC Chapter 35 in Section 2719(d)(1) do not diminish the possibility of the Nations' construction. The Government's weak sponsorship[11] of the Tenth Circuit's

11. In discussing the Tenth Circuit approach, the Government tellingly employs the distancing phrase "could perhaps be instructive." Resp. Br. 14.

suggestion that Chapter 35's reference could be harmonized with the operative text by proffering that Chapter 35 was inserted to incorporate 26 U.S.C. § 4421's definition of "wagers" and "lotteries," Resp. Br. 14, completely ignores the reasoned rejection of that very suggestion contained in *Little Six, Inc. v. United States*, 229 F.3d 1383, 1394 (Dyk, J., dissenting to denial of rehearing en banc), quoted earlier by the Nations, Pet. Br. 9. The fact remains that nothing with extra-Chapter 35 consequences could have been gained by an inclusion for that purpose, since the Section 4421 definitions expressly apply only for the purposes of Chapter 35 itself. Likewise, the Government's claim that the Chapter 35 reference was intended to invoke IRC Sections 4403 and 4412 (but not the exemption-granting Section 4402) is impeached by the very subjects of those two sections, which have nothing to do with the reporting and withholding of winnings by players, as the Government itself notes. *See* Resp. Br. 15.[12]

Finally, the Government's unusual and surprising argument, unsupported by any citation to an opinion of this Court, that the references to IRC § 6050I and Chapter 35 should simply be "read out" of Section 2719(d)(1) is untenable, particularly in light of the Nations' possible construction. Although the "reading out" of text troublesome to the Government without resort to any applicable canon of construction, might be a "far easier" way to resolve every ambiguity in any case, *see* Resp. Br. 16 (so suggesting), such is not the law, particularly in the Indian-law context. The Government's capitulation in the search for textual meaning, ill-founded on a false premise, *see supra* at 9 n.8, neither diminishes the force of the Nations' construction nor renders that construction impossible.

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12. IRC Section 4403 requires persons liable for excise tax to keep daily records of the gross amounts of wagers. IRC Section 4412 requires the registration of employees subject to occupational tax.

C. The Government Has Failed To Demonstrate That The Legislative History Of IGRA Clearly Resolves The Textual Ambiguity In Its Favor.

Of particular import, the Government fails to identify any explanations in any legislative committee report, legislative committee testimony or floor debate as to why Congress included the ambiguity-creating reference to IRC Chapter 35 in Section 2719(d)(1).[13] Likewise, the Government offers no explanations as to why the **substitution** of the specific exemption-containing Chapter 35 for the general taxation language in S.555, 100th Cong. (1987), occurred. Rather, the Government goes to great length to avoid addressing the legal effect of that substitution by inappropriately characterizing the committee action as simply a "deletion." The Government consequently fails to effectively respond to Petitioners' distinguishing of *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987), *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186 (1974), and *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973), Pet. Br. 32-33, on the grounds that the "deletion" principle should have no application to the substitution here. Likewise, the Government completely ignores this Court's Indian-law case

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13. The Government's speculation as to why the ambiguity exists, *see* Resp. Br. 17-18, should be ignored since, as the Government itself notes, "such speculation is not a firm basis for statutory interpretation," *id.* at 18. The Government's invocation of the Origination Clause, U.S. Const. art. I, § 7 (as mentioned by the *Little Six* dissent to denial of rehearing en banc, *Little Six*, 229 F.3d at 1385), not only explains nothing concerning the textual substitution but also is ill-founded. As this Court explained in *Twin City National Bank v. Nebecker*, 167 U.S. 196, 203 (1897), when the main purpose of an act is other than raising revenue, it is not subject to challenge under the Origination Clause. In discussing IGRA's purposes, *see* Resp. Br. 20 n.6, the Government has not suggested that IGRA's main purpose was raising revenue.

of *Oklahoma Tax Commission v. Barnsdall Refineries, Inc.*, 296 U.S. 521 (1936), where even the deletion of language in the final draft of the statute was not held to be dispositive. *See* Pet. Br. 33 n.21 (discussing *Barnsdall Refineries*). The Government's failure to address the Petitioners' distinguishing of the three decisions advanced by the Government, and its ignoring of the *Barnsdall Refineries* case, further undermine the Government's legislative-history argument.

At the end of the Government's legislative-history analysis, the conclusion remains that the substitution of the exemption-containing IRC Chapter 35 for the prior general reference to taxation does not resolve against the Nations the textual ambiguity with that clarity needed to avoid the application of the Indian-law canon. The Petitioners' analysis of the legislative history as non-outcome-determinative remains unrebutted.

D. The Government Has Not Rebutted The Nations' "Motivating Purpose" Demonstration That Their Construction Of Section 2719(d)(1) Is Consistent With And Materially Advances Important Federal Indian Policies Embodied In IGRA.

The Government misapprehends the purpose of the Nations' discussion of the important federal policies embodied in IGRA. The Petitioners do not analyze those policies for the purpose of urging this Court to create a tax-exemption from pure public policy untethered to statutory text. The Nations well know that pure policy without textual ambiguity is insufficient to create a tax-exemption in the face of the general tax-exemption maxim. *See* Pet. Br. 21-27. Rather, the Nations invoke IGRA's policies to demonstrate that the construction resulting from the application of the Indian-law canon to Section 2719(d)(1)'s

ambiguity is consistent with, and materially advances, those policies embodied in IGRA.[14]

The Government does not deny that the application of the Indian-law canon results in a construction of Section 2719(d)(1) that is consistent with the motivating purposes and legal context of federal Indian policy embodied in IGRA. In fact, the Government directly acknowledges that one of IGRA's purposes is "to ensure that gaming benefits flowed primarily to tribes." Resp. Br. 20 n.6. The Nations' construction in favor of the exemption fosters that very purpose by ensuring that gaming benefits represented by the disputed tax amounts flow to tribes. The Government does not dispute that IGRA's policies include strengthening tribal self-government, breaking dependence on federal support, and increasing tribal sufficiency and support for tribal welfare programs. The Government does not dispute that the Nations' construction is consistent with those motivating purposes and legal context. Not surprisingly, the Government points to nothing that suggests that one of IGRA's motivating purposes is to raise federal revenues at the expense of those clearly-recognized, congressionally-encouraged tribal interests, by taxing the ward for the benefit of the guardian.

Likewise, the Government offers no response to the Nations' related observations that Congress was well aware that tribal and state gaming would be conducted for identical purposes, that tribes and states would effectively be competitors, that nothing in IGRA's legislative history suggests any intent to impose an artificial competitive disadvantage on tribal gaming, and that the Nations' statutory construction would avoid such an unintended result. *See* Pet. Br. 38.

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14. The Government's assertion of the importance of statutory "motivating purposes or legal context," Resp. Br. 27, actually invites the very policy analysis performed by the Nations.

The Government's suggestion that Congress could have amended either IRC Chapter 35 or the Indian Tribal Governmental Tax Status Act of 1982, Pub. L. No. 97-473, tit. II, § 202(a), 96 Stat. 2607, 2608 [ITGTSA], to provide an express exemption, changes nothing as to the accuracy of the Nations' policy ("motivating purposes or legal context") analysis. The critical fact remains that Congress expressly chose to address the IRC ramifications of IGRA through IGRA itself, rather than by amending specific sections of the IRC including that portion of the IRC created by ITGTSA. By using IGRA as the vehicle to address IRC application, Congress has relegated to legal irrelevancy the Government's invocation of the IRC and ITGTSA to attempt to overcome IGRA's purpose of allowing tribes to increase their revenues for operating their tribal governments and related programs. The fact that the IRC and ITGTSA were not specifically amended to provide the exemption conferred through IGRA neither erases Section 2719(d)(1)'s textual ambiguity, explains the insertion of IRC Chapter 35 into that text, renders the Indian-law canon inapplicable, nor impeaches the Nations' policy analysis.[15]

15. The "contextual backdrop" of both the wagering-tax provision and ITGTSA suggested by the Government does nothing to diminish the Nations' construction. Nowhere does the Government indicate, by either the words of those statutes or their respective legislative histories, which were utterly silent about tribal gaming, that Congress considered tribal gaming in making those enactments. *See* Revenue Act of 1951, Pub. L. No. 82-183, ch. 521, § 471, 65 Stat. 452, 529-32 (codified as amended in IRC Chapter 35, 26 U.S.C. § 4401 *et seq.*); Indian Tribal Governmental Tax Status Act of 1982, Pub. L. No. 97-473, tit. II, § 202(a), 96 Stat. 2607, 2608 (codified as amended in 26 U.S.C. § 7871(a)(2); H.R. REP. No. 82-586 (1951), *reprinted in* 1951 U.S.C.C.A.S. 1781, 1837-44; S. REP. No. 82-781 (1951), *reprinted in* 1951 U.S.C.C.A.S. 1969, 2065, 2089-96; S. REP. No. 97-646 (1982), at 8-17, *reprinted in* 1982 U.S.C.C.A.N. 4580, 4586-95; H. CONF. REP. (Cont'd)

The combined effect of the Government's emphasis on "motivating purpose or legal context," the Government's failure to dispute the Nations' policy-analysis conclusions as to those motivating purposes, and the Government's admission that one of IGRA's purposes is to "ensure that the gaming benefits flow primarily to the tribes" is patent. The Nations' assertion that their construction of Section 2719(d)(1) is consistent with, and materially advances, important IGRA policies remains unshaken.

CONCLUSION

The Judgments of the United States Court of Appeals for the Tenth Circuit should be reversed so that the Nations, pursuant to 25 U.S.C. § 2719(d)(1), may have the benefit of the tax exemptions afforded to their state governmental-gaming competitors by IRC Chapter 35.

(Cont'd)
No. 97-984 (1982), at 11, 15-17, *reprinted in* 1982 U.S.C.C.A.N. 4595, 4601-03. The codification of the entirety of former IRC Chapter 27A (1952) into what is now IRC Chapter 35 (and more) was accompanied by only two paragraphs of virtually identical (and unilluminating) published legislative history. *See* H.R. REP. 83-1337 (1954), *reprinted in* 1954 U.S.C.C.A.N. 4019, 4468; [Unnumbered] S. REP. (1954), *reprinted in* 1954 U.S.C.C.A.N. 4621, 5127.

That absence of documented Congressional concern about tribal gaming in that legislation is understandable since no tribe would enter the bingo industry until 1979. *See* S. REP. No. 100-446 (1988), at 2, *reprinted in* 1988 U.S.C.C.A.N. 3071, 3072 ("The Seminole Tribe of Florida in 1979 was the first tribe to enter the bingo industry."). That legislative silence prevents any inference from that "contextual backdrop" as to the intent that motivated the enactment of Section 2719(d)(1).

Respectfully submitted,

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No. 00-507

In The

Supreme Court of the United States

THE CHICKASAW NATION and
THE CHOCTAW NATION OF OKLAHOMA,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF SHAKOPEE MDEWAKANTON SIOUX (DAKOTA) COMMUNITY AND LITTLE SIX, INC. IN SUPPORT OF DENIAL OF CERTIORARI

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

Pursuant to Rule 37 of this Court, the Shakopee Mdewakanton Sioux Community, a federally recognized Indian tribal government, and Little Six, Inc., an arm and instrumentality of the Community, hereby move for leave to file the attached brief *amicus curiae* submitted in support of denial of certiorari. Consent for filing this brief was given by Respondent and is being filed with the Clerk. Consent was requested of Petitioners but no response was provided by the time of printing of the brief.

As more fully explained in the brief for which leave to file is sought, the Community and Little Six are parties to *Little Six, Inc. v. United States*, 210 F.3d 1361 (Fed. Cir. 2000), reproduced at Pet. App. p. 101a, which held that the federal wagering taxes imposed under Chapter 35 of the Internal Revenue Code do not apply to pull-tab games conducted by Indian tribal governments. The petition for certiorari discusses *Little Six* at length and asserts that there is a conflict between *Little Six* and the decision with respect to which certiorari is sought that warrants the grant of certiorari. The time period for the United States to file a petition for a writ of certiorari in *Little Six* has not yet expired. If the Court decides to grant certiorari in this case, the Court's decision on the merits could affect the outcome of *Little Six*. The Community and Little Six thus have a direct and substantial interest in this Court's disposition of the petition for certiorari. The Community and Little Six, moreover, bring to this Court arguments made by neither Petitioners nor Respondent that the Community and Little Six believe

would assist the Court in ruling on the petition for certiorari, and requests that its motion be granted.

Respectfully submitted,

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December 29, 2000

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INTEREST OF THE *AMICI CURIAE*[1]

The Shakopee Mdewakanton Sioux (Dakota) Community is a federally recognized Indian tribal government. Little Six, Inc. is an arm and instrumentality of the Community established to operate the Community's gaming operations, which have been conducted since the early 1980s to raise revenues for the tribal government. The Community and Little Six are sometimes referred to collectively as the "Community."

The Community and Little Six are parties to *Little Six, Inc. v. United States*, 210 F.3d 1361 (Fed. Cir. 2000), reproduced at Pet. App. p. 101a. In *Little Six*, a unanimous panel of the U.S. Court of Appeals for the Federal Circuit, a court of nationwide jurisdiction, held in a straightforward and well-reasoned opinion that the 0.25% excise tax and the $50 annual occupational tax imposed under Sections 4401 and 4411 in Chapter 35 of the Internal Revenue Code (the "Code") do not apply to pull-tab games conducted by Indian tribal governments under the Indian Gaming Regulatory Act, 25 U.S.C. § 2701 *et seq.* (1994 & Supp. 1997) ("IGRA").[2] IGRA was enacted in the fall of 1988 to foster the tribal governments' revenue-raising

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[1] Pursuant to this Court's Rule 37.6, *amici* state that no counsel for any party authored this brief in whole or in part, and no person or entity other than *amici*, its members, or their counsel made a monetary contribution to the preparation or submission of the brief.

[2] The panel's opinion was authored by Judge Lourie and joined by Chief Judge Mayer and Judge Schall.

efforts.[3] The Federal Circuit grounded its decision on an interpretation of Section 2719(d) of IGRA, which provides (with emphasis supplied by the court):

> (1) The provisions of the Internal Revenue Code of 1986 (including sections 1441, 3402(q), 6041, and 6050I, *and chapter 35 of such Code*) concerning the reporting and withholding of taxes with respect to the winnings from gaming or wagering operations *shall apply to Indian gaming operations* conducted pursuant to this chapter, or under a Tribal-State compact entered into under section 2710(d)(3) of this title that is in effect, *in the same manner as such provisions apply to State gaming and wagering operations.*
>
> (2) The provisions of this subsection shall apply notwithstanding any other provision of law enacted before, on, or after October 17, 1988, unless such other provision of law specifically cites this subsection.

The Federal Circuit concluded that, because Chapter 35 provides an exemption for state lotteries (in its Section 4402(3)) and is one of the specific Code provisions which Section 2719(d) explicitly provides "shall apply to Indian gaming operations . . . in the same manner as such provisions apply to State gaming and wagering operations," Section 2719(d) should be construed to provide an

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[3] IGRA's stated central purpose is "to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments. . . . ," 25 U.S.C. § 2702(1), three longstanding goals of federal Indian law.

exemption for pull-tab games and other lotteries conducted by Indian tribes.

In the Federal Circuit, the United States had contended that Section 2719(d) only involves provisions concerning the reporting and withholding of taxes with respect to winnings, notwithstanding the explicit references in the statute to Chapter 35 and Section 6050I, two provisions which have nothing to do with winnings.[4] The Federal Circuit rejected the United States's construction and decided in favor of the Community, based on a straightforward analysis of statutory language and legislative history and on the Indian canon of statutory construction which has been applied in numerous decisions of this Court from *Choate v. Trapp*, 224 U.S. 665 (1912), *Squire v. Capoeman*, 351 U.S. 1 (1956), and *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759 (1985), through *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, 502 U.S. 251 (1992). The Indian canon requires generally that statutes enacted to benefit Indian tribes or Indians must be construed liberally, with ambiguities resolved in favor of the Indians. In the federal tax area, the canon requires specifically that statutes or treaties that contain language that can reasonably be construed to confer a federal tax exemption for Indian tribes or Indians should be so construed in their favor.

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[4] Chapter 35 taxes only the operator of the gaming facility, not the players, and the tax is based on gross wagers, not winnings. Section 6050I requires a gaming operator to report cash receipts of $10,000 or more. It does not require reporting of cash payments to players, and therefore is also unrelated to "winnings."

Capoeman, 351 U.S. at 6-7; *Cook v. United States*, 86 F.3d 1095, 1097 (Fed. Cir.), *cert. denied*, 519 U.S. 932 (1996).

On October 12, 2000, after the Chickasaw Nation and the Choctaw Nation (the "Nations") filed their petition for a writ of certiorari in this case, the Federal Circuit denied the United States's petition for rehearing *en banc* in *Little Six*.[5] The time period for the United States to file a petition for a writ of certiorari in *Little Six* has not yet expired. If the Court decides to grant the writ of certiorari in this case, the Court's decision on the merits could affect the outcome of *Little Six*.

We file this brief in order to call the Court's attention to an important misstatement in the petition that bears on what issues would properly be before the Court if certiorari were granted. In addition, we wish to point out to the Court a number of additional reasons why we believe certiorari should not be granted. These relevant matters have not been addressed by the Nations in their petition or by the United States in its brief acquiescing in the petition.

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[5] Three of the court's twelve active judges dissented from the denial of rehearing. Judge Dyk authored the dissenting opinion, which was joined by Judges Newman and Plager.

STATEMENT WITH REGARD TO THE PETITION

The Nations have represented in their petition that "[i]n their appeals, the Nations asserted that [Section 2719(d) of IGRA] provided Indian tribes with the same wagering tax exemption afforded by Chapter 35 of the Internal Revenue Code . . . to states engaged in wagering operations." Pet. p. 3. This statement by the Nations, repeated by the United States in its brief (p. 3), is incorrect. The Nations did not raise the Section 2719(d) exemption question in their appeals to the Tenth Circuit. In fact, the Nations contended – just as the United States did – that Section 2719(d) *only* concerns winnings provisions.[6]

From the outset, the Nations chose to pursue their cases on entirely different legal grounds than the ground on which the Community prevailed in the Federal Circuit. The Nations' central argument in the district court was that Indian tribes are not taxable entities under federal common law, and that neither the Internal Revenue Code nor IGRA altered that result by imposing the federal wagering taxes on the tribes.[7] Noting that Sections

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[6] The Nations' argument before the Tenth Circuit regarding Section 2719(d) is set forth in Appellant's Opening Brief dated June 23, 1999 ("Chickasaw Br."), filed in 10th Cir. No. 99-7042, pp. 20-21; Appellant's Reply Brief dated Sept. 28, 1999 ("Chickasaw Reply Br."), filed in 10th Cir. No. 99-7042, pp. 8-9; Appellant's Opening Brief dated August 10, 1999 ("Choctaw Br."), filed in 10th Cir. No. 99-7072, pp. 20-22; and Appellant's Reply Brief dated Oct. 12, 1999 ("Choctaw Reply Br."), filed in 10th Cir. No. 99-7072, pp. 8-9.

[7] As in the Tenth Circuit, both Nations were represented by the same counsel in the district court and each Nation made the same arguments as the other. The Chickasaw Nations' district

4401 and 4411 of the Code impose the federal wagering taxes only on "persons" as defined in Section 7701(a)(1) of the Code, the Nations argued that Indian tribes are not "persons" under this definition. D. Ct. Br. pp. 10-13. Section 2719(d) of IGRA also did not alter the common law result, the Nations argued, because that provision applies the Code "only to the carefully delineated function of reporting and withholding of players' winnings." *Id.*, p. 14 (emphasis in original); *see also id.* pp. 15-16; D. Ct. Reply Br. pp. 10 n. 7, 11. Thus, the Nations' position regarding the meaning of Section 2719(d) closely resembled the United States's position.[8] In the *Choctaw Nation* case, District Judge Burrage recognized that the Nation had not raised the Section 2719(d) exemption question and expressly refused to reach that question. *Choctaw Nation of Oklahoma v. United States*, 99-1 U.S. Tax Cas. (CCH) ¶ 70,118 (E.D. Okla. 1999), reproduced at Pet. App. p. 33a.[9] In the *Chickasaw Nation* case, Magistrate Judge

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court arguments are set forth in the Brief in Support of Plaintiff's Motion for Summary Judgment dated May 8, 1998, filed in E.D. Okla. No. CV-97-511-P ("Chickasaw D. Ct. Br."), pp. 9-16; and Plaintiff's Brief in Opposition to Defendant's Cross-Motion for Summary Judgment dated June 23, 1998, filed in E.D. Okla. No. CV-97-511-P ("Chickasaw D. Ct. Reply Br."), pp. 4-11. The Choctaw Nation's district court arguments were the same as the Chickasaw Nation's arguments.

[8] The Nations also contended in the district court that a pull-tab game is a "live game" rather than a "lottery" and, therefore, is excluded from Section 4421's definition of taxable "wagers." *See* D. Ct. Br. pp. 17-19.

[9] Judge Burrage stated:

> Plaintiff . . . does not argue that § 2719(d) provides an excise tax exemption for Indian gaming activities.

Payne did address the Section 2719(d) exemption question, but only at the invitation of the United States and only by adopting portions of the United States's proposed conclusions of law nearly verbatim. *The Chickasaw Nation v. United States*, 99-1 U.S. Tax Cas. (CCH) ¶ 70,121, at 88,759 (E.D. Okla. 1998) (conclusions of law 26 and 27), reproduced at Pet. App. 47a; *see* United States' Proposed Findings of Fact and Conclusions of Law filed May 18, 1998, in E.D. Okla. No. CV-97-511-P, pp. 10-11.

The Nations' central argument in the Tenth Circuit was that the federal wagering taxes are imposed only on "persons" as defined in Section 7701(a)(1) of the Code, and that Indian tribes are not "persons" under this definition. Chickasaw Br. pp. 10-18; Choctaw Br. pp. 10-19. As a corollary to this argument, the Nations contended that Section 2719(d) of IGRA only concerns reporting and withholding requirements and not the federal wagering taxes and, thus, does not alter the Code's exclusion of tribes from the "persons" subject to the taxes. Each Nation stated in its opening brief:

> [In Section 2719(d)], the application of the IRC is limited to only reporting and withholding as to the player's winnings.

> Indeed, in footnote 7 of Plaintiff's opposition brief, Plaintiff's states "[n]o exemption is necessary since Indian tribes are not taxable entities and are not 'persons' subject to tax." The Court therefore does not address the issue of whether § 2719(d) provides an excise tax exemption for Indian gaming activities.

99-1 U.S. Tax Cas. at 88,744.

Chickasaw Br. p. 21; Choctaw Br. p. 21. Similarly, each Nation stated in its reply brief:

> [T]he Nation is not contending that 25 U.S.C. § 2719(d) provides an exemption. No exemption is needed or claimed.

Chickasaw Reply Br. p. 8; Choctaw Reply Br. p. 8. Thus, in the Tenth Circuit, the Nations' position regarding the meaning of Section 2719(d) continued to closely resemble the United States's position.[10] The Tenth Circuit panel addressed the Section 2719(d) exemption question briefly in its opinion, but only at the invitation of the United States and only by adopting the United States's contentions without analysis or the benefit of the adversary briefing that took place in the Federal Circuit. *See The Chickasaw Nation v. United States*, 208 F.3d 871, 883 (10th Cir. 2000), reproduced at Pet. App. p. 1a; *see also id.* at 882 (recognizing that Nation contended that Section 2719(d) concerns only those "IRC provisions . . . pertaining to the reporting and withholding of taxes with respect to players' winnings").

After losing before the panel, the Nations attempted to argue that Section 2719(d) provides an exemption in their petitions for rehearing and suggestions for rehearing *en banc*, but the petitions were denied.

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[10] The Nations also made the "live game" argument they had made in the district court and made a new treaty-based exemption argument. *See* Chickasaw Br. pp. 23-29; Choctaw Br. pp. 24-30.

As discussed more fully below, the Nations' misstatement that they raised the Section 2719(d) exemption question in their appeals bears on what issues would properly be before the Court if certiorari were granted.

REASONS FOR DENYING THE WRIT

There are several reasons why certiorari is inappropriate in this case.

1. There is no square conflict in the circuits with respect to the question presented in the Nations' petition. The petition raises only one question for review: whether under the Indian canon of construction, Section 2719(d) of IGRA confers on Indian tribes the same exemption from federal wagering taxes that is provided to states under Chapter 35 of the Code. Unlike the Federal Circuit, the Tenth Circuit did not address whether the Indian canon should be applied in interpreting Section 2719(d). *See Chickasaw Nation*, 208 F.3d at 883. Thus, there is no square conflict in the circuits with respect to the question presented in the petition.

2. The Court has stated in numerous cases that certiorari is inappropriate to consider a question neither pressed nor passed upon below. *E.g., United States v. Williams*, 504 U.S. 36, 40 (1992); *Yee v. City of Escondido*, 503 U.S. 519, 533 (1992). The question raised in the petition not only was not passed upon in either the Tenth Circuit or the district court, it also was not pressed in either of these courts. Indeed, as discussed above, the Nations never raised *any* aspect of the Section 2719(d)

exemption question in either of the lower courts.[11] While the Tenth Circuit panel did address the exemption question in its opinion, it merely adopted the United States's contentions without analysis, without the benefit of adversary briefing, and, as the Federal Circuit noted, without considering how the Indian canon of construction bears on *this* issue. *See* 210 F.3d at 1365 n. 2. Under these circumstances, certiorari is inappropriate. *See United States v. Alvarez-Sanchez*, 511 U.S. 350, 360 n. 5 (1994) (declining to depart from Court's general practice not to review claims not argued either in district court or court of appeals); *Yee*, 503 U.S. at 538 (declining to address a question because it had not been "fully litigated below, [with] the benefit of developed arguments on both sides and lower court opinions squarely addressing the question").

3. The Federal Circuit reached the correct result in *Little Six*, applying well-established rules of statutory construction requiring an examination of statutory language and legislative history *and* application of the Indian canon of construction. In its brief filed in this Court, the United States continues its efforts to harmonize Section 2719(d)'s reference to "Chapter 35" with the

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[11] The Nations' belated attempt in their petitions for rehearing to argue that Section 2719(d) provides an exemption, a point they previously conceded, was justifiably ignored by the Tenth Circuit as too late to be considered. *See, e.g., Sierra Club v. Hodel*, 848 F.2d 1068, 1100-01 (10th Cir. 1998) (party may not assert new ground for relief in petition for rehearing); *United States v. Smith*, 781 F.2d 184, 184-85 (10th Cir. 1986) (party may not use petition for rehearing to raise issue previously conceded).

"winnings" language (pp. 6-7), but even Judge Dyk's dissenting opinion from the denial of rehearing in *Little Six* concedes "there is no way to reconcile" these references in the statute. U.S. Br. App. p. 3a. The United States also persists in relying on an isolated change in the original bill language to support its position regarding Section 2719(d) (pp. 7-8), omitting to mention another change in language and other legislative history that supports the Federal Circuit's holding in *Little Six*.[12] Even Judge Dyk goes no farther in dissent than to conclude that the "legislative history here provides no clear guidance" regarding the meaning of Section 2719(d). U.S. Br. App. p. 7a. Under these circumstances, the Federal Circuit properly relied on the Indian canon of statutory construction as well as statutory language and legislative history to reach its holding regarding congressional intent.[13]

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[12] Most important in this history, Congress deliberately added "Chapter 35" to Section 2719(d) at the same time that "taxation" was removed. *Compare* 27 U.S.C. § 2719(d) *with* S. 555, 100th Cong., 1st Sess. (1987). This supports the Federal Circuit's holding, because "Chapter 35" and "taxation" had been used interchangeably during the legislative process. *See* H.R. Rep. No. 488, 99th Cong., 2d Sess. 12 (1986) (equating original "taxation" language and "Chapter 35").

[13] Despite the United States's suggestions to the contrary, this Court has never enunciated a different standard for application of the Indian canon in federal and state tax cases. *Squire v. Capoemen* is the leading federal Indian law case on statutory construction and federal taxation. There, the Court relied in part on the Indian canon to hold that a statute providing for "restrictions as to . . . taxation of such land" provided Indians with an exemption from federal income tax. 351 U.S. at 7. The statutory language of Section 2719(d) provides *stronger* support for a tax exemption than the statute at issue in

4. The conflict in outcomes between the Tenth Circuit case and the Federal Circuit case is tolerable. The Nations exaggerate in stating that the conflict in outcomes "prevents uniform application of our national scheme of taxation." Pet. p. 11. The Federal Circuit is a court of nationwide jurisdiction, and its decisions help ensure uniform application of the federal tax laws. The vast majority of tribes have not yet litigated their refund claims and presumably will pursue them in the U.S. Court of Federal Claims, which is bound by the decision of the Federal Circuit.[14] Apart from the Nations' cases, we are aware of only one other pending case, *Lower Sioux Indian Community in Minnesota v. United States*, Civ. No. 99-911 (D. Minn. filed Jun. 16, 1999), appealable to the Eighth Circuit, which presents questions regarding the applicability of the federal wagering taxes to Indian tribes. The three tribal plaintiffs in that case are seeking refunds on the basis that Section 2719(d) provides an exemption for tribal pull-tab games. Assuming the case reaches the Eighth Circuit, the Eighth Circuit may agree with the Federal Circuit that Section 2719(d) provides an

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Capoeman, because Section 2719(d) explicitly refers to Chapter 35 among the Code provisions to be applied to tribes in the same manner as to states, whereas the statute in *Capoeman* did not mention the federal income tax.

[14] In any case in which the IRS seeks to impose the Chapter 35 taxes on an Indian tribe, the tribe may contest the liability by paying the amount in dispute and bringing refund litigation either in the U.S. Court of Federal Claims or in the U.S. District Court for the district in which the tribe is located. 28 U.S.C. § 1346(a)(1) (1994). The U.S. Tax Court does not have jurisdiction to determine liability for the federal wagering taxes.

exemption, on the basis of the same established rules of statutory construction applied by the Federal Circuit.[15]

5. This case is not sufficiently important to warrant this Court's attention. The federal wagering taxes are very narrow taxes that raise a very small amount of revenue for the United States. The Treasury Department in both the Carter and Reagan administrations advocated the complete abolition of the federal wagering taxes, because they raise only "extremely minor" revenues and are a poor tool for enforcing the criminal gambling laws and therefore no longer serve their intended purpose. *See* 127 Cong. Rec. S2270-71 (Feb. 17, 1981), S32084-85 (Dec. 16, 1981). By fiscal year 1999, the wagering excise tax raised only $13.8 million, even less than the $19.8 million raised by the excise tax on bows and arrows and far less than the $6.6 billion and $21.2 billion raised by the excise taxes on air transportation and gasoline, respectively. *See* www.irs.ustreas.gov/tax_stats/soi/exc_exc.html, file 00EX20TE.EXE. Moreover, the imposition of the federal wagering taxes on tribal governments was only an afterthought of the Internal Revenue Service, which did not develop the position that tribal governments are subject to the taxes until 1992, over ten years after the tribes had begun to conduct pull-tab games. *See* IRS Tech. Adv. Mem. 9229005 (CCH) (Apr. 2, 1992) (first statement of IRS position that tribes are subject to Chapter 35 taxes).

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[15] Likewise, if any tribes choose to pursue refund litigation in the Tenth Circuit in the future and there is adversary briefing regarding the Section 2719(d) exemption question, the Tenth Circuit may decide that it agrees with the Federal Circuit.

Finally, if Congress is concerned about the Federal Circuit's interpretation of Section 2719(d), it can amend the statute without the need for intervention by this Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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No. 00-507

IN THE

Supreme Court of the United States

The Chickasaw Nation and The Choctaw Nation,
Petitioners,

v.

United States,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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CONSENT OF PARTIES

Petitioner, and respondent have consented to the filing of this brief, *amici curiae*.[1]

INTEREST OF THE *AMICI CURIAE*

Amici is a federally recognized Indian tribal government and has a vital interest in the legal issues that affect tribal self-government and sovereignty. Of obvious concern to *amici* are the tax ramifications against Indian governmental gaming based upon the final disposition of the underlying case.

The *amici* tribe's participation in the present case is appropriate because of (1) the impact and affect on *amici* (and its budgeting and self-determination efforts) of the ultimate determination and interpretation of the Indian Gaming Regulatory Act (hereinafter referred to as "IGRA"), (2) *amici's* interest in the continuing viability of long-established Indian canons of construction, (3) *amici's* interest to ensure that the spirit and policy of IGRA is supported by the highest court in the land, and (4) the direct impact on *amici* with regard to federal agency interpretations of other statutes and regulations which may hinder Indian self-determination.

Because of the importance of this issue to Indian tribes, *amici* submit this brief to assist the Court in its resolution of the case.

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[1] Their consents have been filed with the clerk of this Court. This brief was authored by the *amici* by the *amici* and counsel listed on the front cover hereof, and was not authored in whole or in part by counsel for a party. No person or entity, other than *amici curia*, their members, or their counsel, made a monetary contribution to the preparation of this brief.

SUMMARY OF ARGUMENT

1. *Amici* asserts that Section 20(d) of the IGRA exempts Indian tribal governments from federal wagering taxation, to the extent said wagering taxation applies to tribal governments, in the manner that state governments are exempted. *Amici* urges the Court to construe the federal statutory exemptions at bar under principles of construction which have been used in construing exemptions under the Fair Labor Standards Act (a federal statute that does not expressly mention tribal governments).

2. *Amici* urges the Court to reject the Respondent's construction of the statutory exemptions at bar, as violating Respondent's authority pursuant to Executive Order 13175 and its predecessors.

3. *Amici* disagrees that gaming activities conducted by tribal governments pursuant to the IGRA are "wagers" within the meaning of 26 U.S.C. Section 4421(1)(C).

4. *Amici* further supports the positions advanced by the Petitioner that: (1) Section 20(D)'s language itself mandates that tribal governments be afforded the same exemptions as are afforded to state governments, (2) to the extent the language is not clear on its face, the legislative history to the IGRA mandates this result, and (3) to the extent the statute is deemed ambiguous, long standing cannons of construction applying federal statutes to tribal governments mandate this result.

ARGUMENT

I. THE STATUTORY EXEMPTIONS AT BAR SHOULD BE CONSTRUED IN A MANNER TO PLACE TRIBAL AND STATE GOVERNMENTS ON PAR, UNDER PRINCIPLES SIMILAR TO THOSE EXTENDING FAIR LABOR STANDARDS ACT EXEMPTIONS TO TRIBAL GOVERNMENTS.

As set forth in section IV below, *amici* agrees (to the extent that the Wagering Statutes at bar apply to tribal governments in the first place) with Petitioner that said statutes, on their face, would exempt tribal governments from taxation to the same extent state governments are entitled to exemption, and agrees that the legislative history to the IGRA, and canons of construction favoring tribal governments, in any event, resolve any such doubts in favor of the Petitioner.

Even if the statutory language and legislative history were not persuasive in this regard, however, *amici* asserts that the Wagering Statutes at hand should nonetheless be construed to place tribal governments on par with state governments under principals similar to those set forth in the Seventh Circuit decision of *Reich v. Great Lakes Indian Game and Wildlife Commission*.[2]

In *Great Lakes*, the Seventh Circuit was asked to construe the applicability of an exemption under the federal Fair Labor Standards Act ("FLSA") for "public law enforcement officers" to "tribal" law enforcement officers. Under Section 29 U.S.C. 207(k) of the FLSA, law enforcement officers of a "public agency" are entitled to certain exemptions from the statute's wage and overtime requirements. Unfortunately, however, that statute does not define "public agency" with reference to tribal governments.[3]

While the Department of Labor (DOL) urged a "literal" interpretation of the statute which would have excluded tribal police from the law enforcement exemption, the Seventh

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[2] 4 F.3d 490 (7th Cir. 1993).

[3] The FLSA defines "public agency" to mean "the government of the United States; the government of a state or political subdivision thereof; any agency of the United States (including the U.S. Postal Service and Postal Rate Commission), a state, or a political subdivision of a state; or any interstate governmental agency." 29 U.S.C. 207(k).

Circuit confirmed that the "plain meaning" cannon urged by the DOL must be reconciled against the canon "that not only treaties but (other) federal statutes as well are to be construed so far as is reasonable to do in favor of Indians."[4]

The Court went on to note that:

> Even literalists, that is to say, acknowledge the applicability to statutes of the principle of contract interpretation that allows the court to seek meaning beneath the semantic level not only when there is an 'intrinsic' ambiguity in the contract but also when there is an 'extrinsic' one, that is, when doubt that the literal meaning is the correct one arises only when one knows something about the concrete activities that the contract was intended to regulate.[5]

In ultimately construing the FLSA law enforcement exemption to include tribal law enforcement officers, the Seventh Circuit noted as follows:

> A literal reading of the Fair Labor Standards Act would create a senseless distinction between Indian police and all other public police. Nothing in the Act alerts the reader to the problem; you have to know that there are Indian police to recognize it. But once it is recognized, the Act, viewed as a purposive, rational document, becomes ambiguous, creating

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[4] *Great Lakes*, 4 F.3d at 493 (citing to *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766-68, 105 S Ct. 2399, 2403-04, 85 L.Ed.2d 753 (1985)).

[5] *Id* at 494.

> room for interpretation. We cannot think of any reason other than oversight why Congress failed to extend the law enforcement exemption to Indian police. . . .[6]

State governments use wagering activities for public purposes, such as road construction and repair, schools, and to fund other public facilities and programs, which ultimately reduce the burden on limited federal assistance. Accordingly, it is easy to see why wagering revenues received by state governments are exempt from federal taxes.

Like state governments, however, tribal governments use wagering activities to fund the public treasury. In fact, tribal governments are arguably more restricted than states (due to IGRA) in the use of wagering revenues for public purposes, and tribal governments have historically been more dependant than state governments on federal funding. Accordingly, the wagering revenues used by tribal governments for self-determination purposes clearly reduce the amount of reliance otherwise burdened upon the federal government and, in fact, do so to a larger extent than that of their state government counterparts.

If the Court were to accept Respondent's arguments, the Chapter 35 wagering taxes would apply solely to <u>private</u> entities, with a single exception (by its alleged silence) with regard to tribal governments. Once you know that tribal governments exist, however, and that tribal governments, like state governments, are authorized to fund governmental activities through wagering activities, the government exemption would "create a senseless distinction" between Indian government and state government.

Under these principles, *amici* urge the Court to construe the statutes at bar in a manner to place tribal governments on par with state governments in this regard.

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[6] *Id.*

II. RESPONDENT'S CONSTRUCTION OF THE STATUTORY EXEMPTIONS AT BAR VIOLATES THEIR AUTHORITY PURSUANT TO EXECUTIVE ORDER 13175.

Executive Order 13175, 65 Fed. Reg. 67249 (November 9, 2000)(replacing Executive Order 13084), requires federal agencies, including the Internal Revenue Service, to construe federal statutory and regulatory requirements with deference to tribal governments, and in a manner designed to promote Indian self-determination. Specifically, the recent Executive Order, Section 2 provides as follows:

> In formulating or implementing policies that have tribal implications, agencies shall be guided by the following principles:
>
> (a) The United States has a unique legal relationship with Indian tribal governments as set forth in the Constitution of the United States, treaties, statutes, Executive Orders, and court decisions. . . .
>
> (b) Our Nation, under the law of the United States, in accordance with treaties, statutes, Executive Orders, and judicial decisions, has recognized the right of Indian tribes to self-government. As domestic dependant nations, Indian tribes exercise inherent sovereign powers over their members and territory. The United States continues to work with tribes on a government-to-government basis to address issues concerning Indian tribal self government, tribal trust resources, and Indian tribal treaty and other rights.
>
> (c) The United States recognizes the right of Indian Tribes to self-government and supports tribal sovereignty and self-determination.

Moreover, the Executive Order, Section 5, mandates that federal agencies consult with tribal governments before construing federal statutes or regulations in a manner which would hinder self-determination.

Here, gaming revenues under IGRA activities are expressly limited to purposes which further tribal self-determination. Respondent's construction of the federal wagering statutes at hand, therefore, should be made only after due consultation and consideration of its impact on self-determination. Under the principles set forth in the above Executive Order, to the extent there is an ambiguity in the exemption at bar, the Respondent's should be required to resolve that ambiguity in favor of the tribe.

III. THE PURCHASE OF A PULL-TAB CARD OFFERED BY A TRIBAL ENTITY DOES NOT CONSTITUTE A "WAGER" AS DEFINED IN 26 U.S.C. § 4421(1)(C), BECAUSE INDIAN GAMING OPERATIONS ARE NOT CONDUCTED "FOR PROFIT".

In addition to the ambiguities of IGRA Section 20(d), purporting to incorporate Chapter 35 of the Internal Revenue Code (the Wagering Statues), Chapter 35 itself is fraught with ambiguity. As demonstrated below, the intent and application of Chapter 35 appears directed to commercial gaming activities rather than governmental gaming activities. There is no evidence that the drafters of the Wagering Statutes contemplated Indian gaming activities. Accordingly, *amici* disagrees that the pull-tab activities at issue constitute "wagers" under the wagering taxation statutes at hand. 26 U.S.C. § 4421 defines a "wager" as follows:

> (1) wager – The term "wager" means –
>
> (A) any wager with respect to a sports event or a contest placed with a person engaged in the business of accepting such wagers,
>
> (B) any wager placed in a wagering pool with respect to a sports event or a contest, if such pool is conducted ***for profit***, and
>
> (C) any wager placed in a lottery conducted ***for profit***. (emphasis added).

As this Court is well aware, Indian governments operate gaming activities to derive revenue for governmental purposes. According to the declaration of purposes section stated by Congress, one of the primary purposes to enact IGRA was "to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency and ***strong tribal governments"*** (emphasis added). [7] Indian gaming activities are not "for profit" commercial enterprises that 26 U.S.C. Section 4401 (the "Wagering Statute") seeks to target.

Thus, implementation of the federal wagering excise tax on tribal gaming operations will tax "tribal governmental" revenue in a manner contrary to both the spirit and purpose of IGRA and the federal Wagering Statute. The Ninth Circuit, in fact, addressed the issue of the purpose and aim of the Wagering Statute in *United States v. D.I. Operating Co.*[8] and construed the reference of "for profit" in Section 4421(1)(B) as for a "commercial purpose".

> The committee reports accompanying the [Wagering Statute] reveal that it was intended to make '**commercialized gambling**' help meet the 'present need for increased revenue, especially at a time when many consumer items of a semi-necessity nature are being called upon to bear new or additional tax burdens.' (emphasis added)[9]

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[7] 28 U.S.C. § 2702 (1988).

[8] 362 F.2d 305 (1966).

[9] *Id.* at 308 (quoting H.Rep. No. 586, 82d Cong., 1st Sess., p. 55(1951-2 Cum.Bull. 357, 397); S.Rep. No. 781, 82d Cong., 1st Sess., p. 113 (1951-2 Cum.Bull. 458, 539).

The *D.I.Operating Co.*, case also recognized that "[t]he phrase 'conducted for profit' is not so clear and unambiguous as to be closed to construction."[10] As set forth above, ambiguities should be construed in favor of tribal governments. Thus, *amici* urges the Court to hold that pull-tab operations conducted by tribal governments (pursuant to the IGRA) are not "wagers" within 29 U.S.C. 4421.

The ambiguity in construing Chapter 35 (the Wagering Statutes) is compounded, rather than removed, by IGRA's purported incorporation of Chapter 35 by parenthetical reference. *Amici* urge the Court to hold that such incorporation is not intended to change the scope of Chapter 35 (i.e., what is a wager).

IV. SECTION 20(D) OF IGRA, WHICH EXPLICITLY REFERENCES SECTION 6050I AND CHAPTER 35 OF THE INTERNAL REVENUE CODE, EXEMPTS TRIBES FROM FEDERAL WAGERING TAXATION.

Finally, to the extent that the wagering statutes apply to tribal governments, *amici* urges the Court to adopt Petitioner's position that the parenthetical language[11] contained in Section 2719(d), and the legislative history thereto, be construed to provide that Indian governmental

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[10] *Id.*, at 309.

[11] Section 2719(d) of IGRA provides:

> (1) The provisions of the Internal Revenue Code of 1986(including sections 1441, 3402(q), 6041 and 6050I, and chapter 35 of such Code) concerning the reporting and withholding of taxes with respect to winnings from gaming or wagering operations shall apply to Indian gaming operations conducted pursuant to this chapter, or under a Tribal-State compact entered into under section 2710(d)(3) of this title that is in effect, in the same manner as such provisions apply to State gaming and wagering operations.

gaming operations would be treated similar to that of state gaming operations.

CONCLUSION

For the foregoing reasons, *amici* requests that the Judgement of the United States Court of Appeals for the Twelfth Circuit be reversed.

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In the

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CHICKASAW NATION,

Petitioner,

v.

UNITED STATES,

Respondent.

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FOR THE TENTH CIRCUIT

BRIEF OF AMICI CURIAE LOWER SIOUX INDIAN COMMUNITY IN MINNESOTA, FOND DU LAC BAND OF LAKE SUPERIOR CHIPPEWA, AND BOIS FORTE BAND OF CHIPPEWA IN SUPPORT OF PETITIONER CHICKASAW NATION

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INTEREST OF AMICI CURIAE[1]

The *amici curiae* are three federally recognized Indian tribes in Minnesota. They support the position of the Chickasaw Nation in the present case. All three *amici* tribes have sold pull-tabs for many years in conjunction with tribally-run casinos. The pull-tab sales have been made in accordance with applicable court rulings and the federal Indian Gaming Regulatory Act, 28 U.S.C. § 2701 *et seq.* (hereafter, "IGRA"). The tribes sold pull-tabs in the belief that they were not required to pay the federal taxes imposed under the Internal Revenue Code, 26 U.S.C. §§ 4401 and 4411 with regard to pull-tab wagers.

During the early years of the tribal pull-tab sales, the Internal Revenue Service gave no indication that it believed that the taxes under §§ 4401 and 4411 were applicable to tribal operations. However, after several years of inaction, the Internal Revenue Service assessed taxes, penalties, and interest against these tribes for past pull-tab sales.

The *amici* tribes paid the assessments for certain periods, filed administrative requests for refunds (which were denied), and filed an action in the United States District Court for the District of Minnesota challenging the denial of refunds. The legal rationale underlying that district court action is the same rationale that is at the heart of the present case before this Court. The proceedings in the *amici's* action in federal district court are being held in abeyance pending this Court's decision. At stake for the *amici* tribes is more than $400,000 of tribal funds.

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[1] Counsel for the Petitioner and counsel for the Respondent have consented to the filing of this *amici curiae* brief. The letters of consent have been filed along with the copies of this brief. Counsel for a party did not author this brief in whole or in part. No person or entity, other than *amici curiae*, their members, or their counsel, made a monetary contribution to the preparation of this brief.

The *amici* tribes also submitted a brief to the United States Court of Appeals for the Federal Circuit in support of the Shakopee Mdewakanton Sioux Community in *Little Six, Inc. v. United States*, 210 F.3d 1361 (2000), a case which also involved the same issues as are in the present case. Additionally, the *amici* tribes submitted a brief to the United States Court of Appeals for the Tenth Circuit on the Chickasaw Nation's petition for rehearing in earlier proceedings in the present case.

The *amici* tribes' participation in the present case is appropriate because of 1) their continuing involvement in similar litigation in federal district court, 2) their potential monetary loss if this Court makes a decision adverse to their claims, 3) their participation in the *Little Six* case and the earlier proceedings in the present case, 4) their interest in the continuing viability of the long-established Indian canons of construction, and 5) their interest in receiving the full benefits of what Congress intended when it passed the IGRA.

In this brief the *amici* tribes wish to emphasize to the Court 1) that Congress has spoken to the issue of potential ambiguities in the Act; 2) that Congress assumed throughout deliberations on the Act that tribes and states were equal sovereigns to be treated equally by the federal government; and 3) that it is reasonable to read the Act as granting tribes the same tax treatment as states even without resort to the Indian canons of construction.

SUMMARY OF ARGUMENT

If the Court concludes that there are ambiguities in the IGRA with regard to the application of federal wagering taxes to tribal enterprises, Congress has indicated its intent as to how those ambiguities should be resolved. The Senate Committee Report on S. 555 (the bill that became the IGRA) stated very clearly the expectation that ambiguities will be

resolved in the manner that is most favorable to tribal interests. When the bill was explained on the floor of the House of Representatives, Chairman Udall of the House Committee on Interior and Insular Affairs declared a similar expectation. Normally, courts would be expected to apply the Indian canons of construction to any federal statute relating to Indian affairs. However, the legislative history of the IGRA makes it clear that Congress explicitly intended those canons to be applied to any ambiguities in that Act. The United States argues that the Indian canons of construction cannot be applied to the provisions of the IGRA relating to the treatment of tribes as states for wagering tax purposes. The United States' arguments cannot survive either 1) the expressed intent of Congress that the Indian canons of construction be used to interpret any ambiguities in the IGRA or 2) the common law requirement that the Indian canons of construction must be used generally to interpret statutory ambiguities.

Throughout the legislative history of the IGRA are indications that Congress intended to treat tribes and states as equals. Tribal gaming operations were viewed in the same context as state lotteries—both provide funding for essential governmental programs serving the general welfare. To find that federal wagering taxes do not apply to state gaming operations but do apply to tribal gaming operations would violate the understanding and intent of Congress. The IGRA should be interpreted in a manner that recognizes the congressional acknowledgment of tribes and states as equal sovereigns.

It is entirely reasonable to read §20(d) of the IGRA (25 U.S.C. § 2719(d)) as exempting tribal operations from federal wagering taxation in the same manner that state lotteries are exempted. Such a reading is consistent with the wording of §20(d) and is consistent with the underlying purposes of the IGRA. By specifically naming chapter 35 of the Internal Revenue Code as one of the provisions of the Code that apply

to tribal gaming operations in the same manner as they apply to state gaming operations, the IGRA exempts tribal operations from wagering taxation. The United States tries to read the reference to "chapter 35" out of the law. However, the proffered United States' interpretation eliminates specific congressional language and makes little sense in the context of the Act and its history. The United States also claims that a wording change between early and late drafts of S. 555 (the bill that became the IGRA) shows an intent to impose wagering taxes on tribal operations. However, there is no evidence supporting the United States' claim. There is no legislative history that shows that anyone thought there was any significance to the language change, and the author of S. 555 specifically contradicts the assertions of the United States.

ARGUMENT

I. CONGRESS HAS GIVEN DIRECTIONS ABOUT HOW AMBIGUITIES IN THE IGRA SHOULD BE RESOLVED.

Congress was clear in its instructions to the judiciary about how the provisions of the Indian Gaming Regulatory Act of 1988 were to be interpreted. Representative Morris Udall, Chairman of the House Committee on Interior and Insular Affairs, presented S. 555 (the bill that ultimately became the IGRA) to the House of Representatives for passage. At the beginning of his remarks urging the House to pass the bill, Udall pointedly explained:

> Mr. Speaker, while this legislation does impose new restrictions on tribes and their members, it is legislation enacted basically for their benefit. *I would expect that the Federal courts, in any*

> *litigation arising out [sic] this legislation, would apply the Supreme Court's time-honoring rule of construction that any ambiguities in legislation enacted for the benefit of Indians will be construed in their favor.*

134 *Cong. Rec.* H8153 (Sept. 26, 1988) (emphasis added).

This same instruction was memorialized in the Senate Committee Report on S. 555 (the only formal Committee Report on the IGRA). When discussing the federal courts' role in resolving disputes about state-tribal compacts under the Act, the Senate Committee Report stated:

> The Committee recognizes that this may include issues of a very general nature and, and course [sic], *trusts that courts will interpret any ambiguities on these issues in a manner that will be most favorable to tribal interests* consistent with the legal standard used by courts for over 150 years in deciding cases involving Indian tribes.

S. Rep. No. 446, 100th Cong., 2d Sess. 15 (1988)(emphasis added).

These statements pointedly indicate the expectation of—and indeed instruction from—Congress about how the IGRA should be interpreted when litigation over its provisions inevitably arrives at the federal courts. Congressional expectation in this regard was not unique. Judicial canons of construction for over 100 years have directed that congressional acts be interpreted to the benefit of Indians and their governments. What is unique was the specific highlighting of these canons in the Committee Report on S. 555 and in the presentation of the bill to Congress by the chairman of the committee from which the bill came.

Even in the absence of instructions from Congress, there should be little argument as to whether the canons of construction can be used in the present case. The canons are well established and have been applied from the 1800's[2] to the present.[3] Their formulations have been many[4], and since they will be discussed extensively by others in the present case, *amici* tribes will not dwell on them.

The *amici* tribes do want to emphasize one point, however. To the extent there is any doubt about the canons' applicability here, that doubt is removed by the specific congressional intent and direction that they shall be used. The United States may argue that the canons should be changed for this situation, but the intent of Congress is that the canons are the tools which the courts should use in interpreting the Indian Gaming Regulatory Act. To ignore the canons when interpreting the "treatment as a state" language of § 20(d) of the IGRA (25 U.S.C. § 2719(d)) is to ignore congressional intent. If there is any ambiguity about what § 20(d) of the IGRA means, that ambiguity must be resolved in the tribes' favor.

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[2] "This rule of construction has been recognized, without exception, for more than a hundred years...." *Choate v. Trapp*, 224 U.S. 665, 675 (1912).

[3] "We have held that Indian treaties are to be interpreted liberally in favor of the Indians...and that any ambiguities are to be resolved in their favor...." *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 200 (1999).

[4] *See, e.g., County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, 502 U.S. 251, 269 (1992); *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985); *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 247-248 (1985), *reh denied* 471 U.S. 1062 (1985); *Bryan v. Itasca County*, 426 U.S. 373, 392 (1976); *Squire v. Capoeman*, 351 U.S. 1, 6-7 (1956); *Tulee v. Washington*, 315 U.S. 681 684-685 (1942).

II. THE IGRA SHOULD BE INTERPRETED IN LIGHT OF THE UNDERLYING INTENT OF CONGRESS TO TREAT TRIBES AND STATES AS EQUALS.

The legislative history of the IGRA is replete with comments to the effect that a prime purpose of the Act was to allow tribes to earn governmental dollars for various public programs, *just as states are able to do with state-run lotteries*. The Senate Report on S. 555 stated that:

> Indian tribal elected officials demonstrated to the Committee that bingo revenues have enabled tribes, *like lotteries and other games have done for State and local governments, to provide a wider range of government services to tribal citizens and reservation residents than would otherwise have been possible*. For various reasons, not all tribes can engage in profitable gaming operations. However, for those tribes that have entered into the business of business, the income often means the difference between an adequate governmental program and a skeletal program that is totally dependent on Federal funding.

S. Rep. No. 446, 100th Cong., 2d Sess. 2-3 (1988)(emphasis added). The Report goes on to describe the tribal interests to be served by the IGRA as follows:

> A tribe's governmental interests include *raising revenues to provide governmental services for the benefit of the tribal community and reservation residents*, promoting public safety as well as law and order on tribal lands, realizing the objectives of economic self-sufficiency and Indian self-

> determination, and regulating activities of persons within its jurisdictional borders.

Id. at 13 (emphasis added).

Senator Inouye, when introducing the bill to the Senate, stated that:

> Bingo revenues have enabled tribes, *like lotteries and other games have done for State and local governments,* to provide a fuller range of government services to their members than would otherwise have been possible.

133 *Cong. Rec.* S2242 (Feb. 19, 1987)(emphasis added).

Congress viewed the IGRA as enabling tribes to do the same things that states do with lottery revenue. It therefore is logical and reasonable to conclude that Congress intended to treat tribe-run gaming the same way that the federal government treats state-run gaming for federal tax purposes. Throughout its consideration of the IGRA, Congress analogized tribal gaming to state gaming. That analogy should be recognized and confirmed by this Court. The IGRA should be interpreted in a way that treats tribal pull-tab operations the same as state lotteries for wagering tax purposes.

As further evidence of Congress' desire to treat tribes the same as states for gaming purposes, the Senate Committee Report and the congressional debates on the IGRA are filled with references to tribes as sovereigns that are in the same general category as states. The Senate Committee Report on S. 555 referred to the tribes and states as "equal sovereigns", both having "significant government interests in the conduct of Class III gaming." *S. Rep. No. 446*, 100th Cong., 2d Sess. 13 (1988). During the congressional consideration of the IGRA, Senator Inouye, on behalf of the Senate Select

Committee on Indian Affairs, consistently referred to Indian tribes and states as "equal sovereigns" that negotiate "to create a consensual agreement between the two sovereign governments." 134 *Cong. Rec.* S12650 and 12651 (Sept. 15, 1988). Senator Evans, Select Committee on Indian Affairs member, classified states and tribes as "two sovereigns" that are "on equal terms and at equal strength." *Id.* at S12654.

In its formulation of and consideration of the IGRA, Congress understood that states and tribes were in the same position with regard to their interest in the governmental conduct of gaming. It is only logical to conclude that this understanding also applied to the taxation of government gaming operations. There is no reason to suppose that Congress intentionally meant to retreat from its "equal sovereigns" analysis solely on the issue of federal taxation. The interpretation of IGRA §20(d) as treating tribes the same as states for wagering tax purposes is the interpretation that is most consistent with how Congress viewed the tribes during the consideration of the IGRA. It is the interpretation that most comports with the design of the statute as a whole and to its object and policy. *See Crandon v. United States*, 494 U.S. 152, 158 (1990).

III. EVEN WITHOUT RESORT TO THE CANONS OF CONSTRUCTION OR LEGISLATIVE HISTORY, IT IS REASONABLE TO INTERPRET THE IGRA AS EXEMPTING TRIBES FROM FEDERAL WAGERING TAXES.

The heart of the present case is the interpretation of section 20(d) of the IGRA (25 U.S.C. § 2719(d)). As passed, that section reads as follows:

> (1) The provisions of the Internal Revenue Code of 1986 (*including* sections 1441, 3402(q), 6041, and

> 6050I, and *chapter 35* of such Code) concerning the reporting and withholding of taxes with respect to the winnings from gaming or wagering operations *shall apply to Indian gaming operations* conducted pursuant to this chapter, or under a Tribal-State compact entered into under section 2710(d)(3) of this title that is in effect, *in the same manner as such provisions apply to State gaming and wagering operations.*
>
> (2) The provisions of this subsection shall apply notwithstanding any other provision of law enacted before, on, or after October 17, 1988, unless such other provision of law specifically cites this subsection.

Emphasis added.[5]

Chapter 35 of the Internal Revenue Code (hereafter, "Code") is specifically referenced as one of the provisions under which Indian gaming operations are to be treated the same as state operations. Chapter 35 is the Code chapter that imposes federal wagering taxes, but that chapter exempts states from such taxes for wagers placed in state-conducted lotteries. When Congress specifically referenced "chapter 35," the most reasonable reading is that Congress meant for tribes to receive the same tax exemption that chapter 35 gives to states.

The United States, however, has urged the courts to read the phrase "chapter 35" out of the IGRA. The United States suggests that tribes are to be treated as states only for purposes relating to the withholding of taxes with respect to winnings from gaming. The problem with that interpretation

[5] The United States Code codification substitutes "title 26" for the original "Internal Revenue Code of 1986.

is that neither chapter 35 nor section 6050I (another section mentioned in the IGRA parenthetical) have anything to do with winnings from gaming. The suggested interpretation of the United States effectively wipes "chapter 35" and "section 6050I" from the statute. That is contrary to good sense and contrary to the accepted rules that all parts of a statute are to be given effect if possible, and that untenable distinctions within statutes should be avoided. *See, e.g., Bailey v. United States*, 516 U.S. 137, 145 (1995); *Fidelity Federal Savings & Loan Association v. de la Cuesta*, 458 U.S. 141, 163 (1982); *American Tobacco Co. v. Patterson*, 456 U.S. 63, 71 (1982).

It is reasonable to read IGRA's reference to chapter 35 as a straightforward statement that tribes are to be treated as states for federal wagering tax purposes. That is the reading urged by *amici* tribes. Such a reading creates less of a statutory construction problem than the proposal urged by the United States, and is a fair reading of the Act.

The fact that the United States and the court below struggle to deal with IGRA's specific reference to chapter 35 of the Code is a strong indication that the statute, if not appropriately clear, is at least ambiguous. If it is ambiguous, the congressional directive and the canons of construction direct that the ambiguity should be resolved in favor of the tribes. In other words, the reference to chapter 35 should be given full effect and the tribes should be exempted from federal pull-tab taxes in the same manner as states.

The United States also has argued that a wording change that occurred between an early version of S. 555 and the final version demonstrates a clear congressional intent to apply federal pull-tab taxes to tribes. The original version of S. 555 had language which used the word "taxation" in the § 20(d) treatment of tribes as states. The final version essentially substituted the term "chapter 35" for the word "taxation." The United States argues that this change was profound proof that Congress decided to apply the pull-tab taxes to tribes.

There are at least three reasons why the United States' argument is far less persuasive than it asserts.

First, it is at least as likely that the drafters of the legislation merely *substituted* the "chapter 35" language for the "taxation" language, rather than eliminating the whole concept of treating tribes like states for taxation purposes. There could have been any number of reasons—political, strategic, procedural, or merely stylistic—for the wording change. However, if the drafters really meant to eliminate the treatment of tribes as states for pull-tab tax purposes, it is strange that they inserted the "chapter 35" language in the statute at all.

Additionally, there is absolutely no indication in the committee report or the congressional discussions that a major taxation change had taken place in the bill. Since a large amount of money would have been involved, and since tribes and their sovereignty throughout the United States would have been affected, one would think that at least some reference to the change would appear in the legislative record. Yet there is absolutely nothing of the sort. If the United States is correct that § 20(d) was consciously and carefully redrafted to divide up precise parts of the Code for "treatment as a state" purposes, it truly is odd that there is no reference at all to this alleged parsing in the committee report or congressional testimony.

Finally, with regard to the reading of the IGRA urged by the United States, the Court must give more than passing credence to the opinion of Senator Daniel K. Inouye, the author of S. 555 and chairman of the committee (the Senate Select Committee on Indian Affairs) from which the bill came. When Senator Inouye became aware that the Internal Revenue Service was informing tribes of its intent to impose chapter 35 pull-tab taxes on them, he wrote a letter of objection to IRS Commissioner Fred Goldberg. The letter has

been submitted to the courts below. Among other things, Senator Inouye wrote the following:

> As primary author of the Indian Gaming Regulatory Act, I write to advise you that it was the intention of the Congress that the tax treatment of wagers conducted by tribal governments be the same as that for wagers conducted by state governments under Chapter 35 of the Internal Revenue Code. Because the purpose of wagers for both tribal and state governments is to provide for the general welfare of their citizens, it was the view of the Congress that to impose a higher rate upon tribal government-conducted gaming activities would be unfair. Accordingly, it was this result that the Congress intended to avoid by including reference to Chapter 35, and stating that, "[t]he provisions of the Internal Revenue Code of 1986 (including...Chapter 35) shall apply to Indian gaming operations conducted pursuant to this Act...in the same manner as such provisions apply to State gaming and wagering operations."

This explanation by the person who was primarily responsible for the creation and passage of S. 555 cannot be ignored. Even if the Court refuses to use the letter as a formal indication of congressional intent, the letter at least should be used to debunk the United States reading of §20(d) of the IGRA. If the wording of S. 555 was deliberately changed in the way the United States alleges, Senator Inouye not only would have been aware of it, he likely would have had to approve it. The recollection of Senator Inouye should be the final factor that puts to rest the United States' argument that S. 555 was changed in order to affirmatively subject tribes to taxation. There simply is no evidence supporting the United

States' opinion about the reason for the language change in S. 555.

CONCLUSION

The Court should interpret the IGRA as Congress likely intended it to be interpreted. The wording of the Act, the intent of the Act, the committee report, and the congressional deliberations all support the reasonableness of the Chickasaw Nation's interpretation of § 20(d) as granting tribes the same treatment as states for federal wagering tax purposes. The IGRA can be interpreted in this way without even resorting to the canons of construction. However, to the extent that there are any ambiguities in the Act, Congress intended that the canons of construction be used to interpret the ambiguities in favor of tribes. With or without the aid of the canons of construction, the IGRA exempts tribal operations from wagering taxes just as state lotteries are exempted.

Respectfully submitted,

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THE CHICKASAW NATION AND THE CHOCTAW NATION OF OKLAHOMA,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF OF AMICUS CURIAE MUSCOGEE (CREEK) NATION IN SUPPORT OF PETITIONERS

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BRIEF OF AMICUS CURIAE MUSCOGEE (CREEK) NATION IN SUPPORT OF PETITIONERS

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The Muscogee (Creek) Nation respectfully submits a Brief Amicus Curiae pursuant to Supreme Court Rule 37.3 in Support of the Petitioners.[1]

THE INTEREST OF THE AMICUS CURIAE MUSCOGEE (CREEK) NATION

The Amicus Curiae herein, Muscogee (Creek) Nation ("Muscogee Nation"), is a federally recognized Indian tribe with its headquarters located in Okmulgee County, Oklahoma. It is one of the "Five Civilized Tribes" (now referred to as the "Five Nations"), a group of Indian tribes which once owned in fee almost all of what is now eastern Oklahoma and which includes the petitioners herein, the Chickasaw Nation and the Choctaw Nation.

Like many other Indian tribes nationwide, the Five Nations eventually lost most of their tribal lands due to Federal advancement of the assimilationist allotment policy of the late 1800's. During the twentieth century, the Muscogee Nation successfully fought to implement its right to self-government and to free itself from Federal

[1] The parties have consented to the filing of this brief. Counsel for a party did not author this brief in whole or in part. No person or entity, other than the Amicus Curiae, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

and state encroachment of that right. In 1976 the Muscogee Nation established judicial recognition of its survival of "statutory dismemberment" which had occurred during implementation of the Federal assimilation and allotment policies. *See Harjo v. Kleppe*, 420 F.Supp. 1110, 1119 (1976), *aff'd sub nom. Harjo v. Andrus*, 581 F.2d 949 (D.C. Cir. 1978).[2] In 1988 the Muscogee Nation established its right to operate a tribal judicial system in a case which held that the Oklahoma Indian Welfare Act, 25 U.S.C. §§ 501, *et seq.*, impliedly repealed provisions in earlier allotment legislation which expressly "stripped the Tribe of the power to have courts." *Muscogee (Creek) Nation v. Hodel*, 851 F.2d 1439, 1443 (D.C. Cir. 1988), *cert. denied*, 488 U.S. 1010 (1989). During this same time period, the Muscogee Nation fought and won a court battle that established that Federal law preempted substantive state regulation of the Muscogee Nation's bingo enterprise and imposition of a sales tax on the bingo enterprise located in Muscogee Nation Indian country. *Indian Country U.S.A., Inc. v. Oklahoma Tax Commission*, 829 F.2d 979, 982 (10th Cir. 1987), *cert. denied*, *Oklahoma Tax Commission v. Muscogee (Creek) Nation*, 487 U.S. 1218 (1988).

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[2] The opinion in the *Harjo* case provides a detailed description of the numerous Federal laws affecting the Five Nations which threatened destruction of their governments in order to force them to enter into allotment agreements, the subsequent "bureaucratic imperialism" exercised by the Bureau of Indian Affairs and the persistence of a competent tribal legislative-executive government "throughout more than half a century of the most adverse conditions imaginable." *Harjo v. Kleppe*, 420 F.Supp. at 1119-1143.

The Muscogee Nation operates several class II (bingo) gaming facilities in Oklahoma, employing 338 persons, 49% of whom are Creek citizens and 25% of whom are members of other Indian tribes. The Muscogee Nation's gaming facilities provide an important source of non-federal revenue to fund tribal government operations and programs and services for its Indian citizens. The Muscogee Nation has an interest in this appeal because a decision by this Court has the potential to adversely impact the Muscogee Nation by diminishing the revenue it needs to administer its governmental programs, services and activities. The undersigned Attorney General of the Muscogee Nation has been authorized by the Principal Chief of the Nation to file this Brief of Amicus Curiae in support of the Petitioners, the Chickasaw Nation and the Choctaw Nation.

SUMMARY OF ARGUMENT

The Respondent United States, on behalf of its agency, the Internal Revenue Service ("IRS"), asks this Court to exempt the IRS from the precepts of the Federal trust responsibility, so that it may assess tribal gaming enterprise pull-tab revenues used directly for tribal government operations and services that benefit tribal members. The position of the IRS that Indian tribes are subject to the Federal wagering and related occupational taxes under the Internal Revenue Code, Chapter 35, 26 U.S.C. §§ 4401 and 4411, is a throwback to the antiquated assimilation policies of the late nineteenth and early twentieth centuries. Such policies have been emphatically rejected by the United States Congress, the United States Courts,

and the President of the United States. More simply stated, the IRS position that Congress did not intend to treat Indian tribes like states for purposes of an express wagering tax exemption is contrary to the Federal policy of Indian self-determination. Courts "are not obligated in ambiguous circumstances to strain to implement [an assimilationist] policy Congress has now rejected, particularly where to do so will interfere with the present congressional approach to what is, after all, an ongoing relationship." *Bryan v. Itasca County*, 426 U.S. 373, 388 n.14 (1976).

The Muscogee Nation supports the position of the Chickasaw Nation and the Choctaw Nation that § 2719(d) of the Indian Gaming Regulatory Act, Pub. L. No. 100-497, Oct. 17, 1988, 102 Stat. 2467 (codified at 25 U.S.C. §§ 2701, *et seq.*) ("IGRA"), is ambiguous and subject to the special canons of construction pertaining to Federal statutes involving Indian tribes. These special canons of construction require that ambiguous Federal statutes are to be construed liberally in favor of Indians, with ambiguous provisions interpreted to their benefit. *Montana v. Blackfeet Tribe*, 471 U.S. 759, 766 (1985).

The Muscogee Nation's purpose in presenting this amicus brief to the Court is to discuss the historical reason for development of these special canons of construction and the continued significance of these rules to Indian tribes as they exist today. The Muscogee Nation further asserts that the decisions of the Tenth Circuit Court of Appeals below in *Chickasaw Nation v. United States*, 208 F.3d 871 (10th Cir. 2001), *cert. granted*, 121 S.Ct. 877 (2001) and in *Choctaw Nation v. United States*, 210 F.3d 389 (10th Cir. 2000), *cert. granted*, 121 S.Ct. 877 (2001),

which both ignored the ambiguity in § 2719(d) of IGRA and failed to apply the applicable canons of statutory construction favorable to Indian nations, is contrary to Congressional intent in its 1988 enactments of IGRA and amendments to the Indian Self-Determination Act, Pub. L. No. 93-638, January 4, 1975, 88 Stat. 2203 (codified at 25 U.S.C. §§ 450, *et seq.*) ("Indian Self-Determination Act"). The Tenth Circuit's failure to apply these canons of construction is contrary to the strong Federal policy of Indian self-determination established by the Executive Office and Congress, and recognized by this Court in numerous decisions.[3]

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[3] The Muscogee Nation will not address the question whether the wagering tax statute would abrogate rights guaranteed by Chickasaw Nation treaties. The Tenth Circuit addressed the question whether the guarantee of self-government contained in Chickasaw Nation treaties could reasonably be construed to constitute a tax exemption as to the wagering tax. The Tenth Circuit concluded that "a treaty provision must be more explicit than the one at issue to exempt an Indian tribe from Federal excise taxes." *Chickasaw Nation v. United States*, 208 F.3d at 885. This conclusion is not at issue in the present case. Although this decision is contrary to established Federal Indian law principles, *see Menominee Tribe v. United States*, 391 U.S. 404, 413 (1968), the Chickasaw Nation and the Choctaw Nation have chosen not to assert their treaty rights in this appeal. The Muscogee (Creek) Nation accordingly retains its right to seek protection of its own individual treaty rights with regard to tax issues through the judicial process, including the opportunity to establish a complete evidentiary record and to fully brief treaty issues.

ARGUMENT

I. The Special Canons of Construction Concerning Ambiguous Federal Indian Legislation are Based on the Federal Trust Responsibility and Apply to Interpretation of § 2719(b) of the Indian Gaming Regulatory Act.

The Muscogee Nation agrees with petitioners that § 2719(d) of IGRA is ambiguous and that special rules of Indian statutory construction, which require an interpretation favorable to the Indian tribes, apply to this case. Application of these special canons of construction result in the conclusion that Congress did not intend to make the Federal wagering taxes applicable to Indian pull-tab operations, but instead intended to treat Indian nations like states for purposes of Federal wagering tax exemptions. *See Little Six, Inc. v. United States*, 210 F.3d 1361 (Fed. Cir. 2000), *petition for cert. filed*, 69 USLW 3497 (2001).

When IGRA was enacted on October 17, 1988, Congress was well aware that the canons of construction applicable to Federal laws affecting Indians are grounded in the Federal trust responsibility. Only twelve days before the enactment of IGRA, Congress enacted the 1988 amendments to the Indian Self-Determination Act of 1975, 25 U.S.C. §§ 450, *et seq.* Pub. L. No. 100-472, Oct. 5, 1988, 102 Stat. 2285. The 1988 amendments addressed a number of Congressional concerns about funding for Indian tribes, and also established the "Tribal Self-Governance Demonstration Project." *Id.* The House and Senate

Reports accompanying the 1988 Indian Self-Determination Act amendments discuss the significance of the Federal trust responsibility in relation to the rules of Indian statutory construction, as follows:

> The right of tribal self-government is further protected by the trust relationship between the Federal Government and Indian tribes. The concept of a federal trust responsibility to Indian people was fashioned gradually by the Federal courts. The concept first appeared in Chief Justice Marshall's opinion in *Cherokee Nation v. Georgia*. During the twentieth century the trust principles articulated in *Cherokee Nation v. Georgia* have been applied in many specific situations to establish and protect rights of Indian tribes and individuals. *Trust obligations define the required standard of conduct for federal officials and Congress.* Fiduciary duties form the substantive basis for various claims against the federal government for breach of its trust responsibility. *Even more broadly, federal action toward Indians as expressed in treaties, agreements, statutes, executive orders, and administrative regulations is construed in light of the trust responsibility. As a result, the trust relationship is one of the primary cornerstones of Indian law.*

H.Rep. No. 393 and S.Rep. No. 274, 100th Cong., 2nd Sess. (1987), *reprinted in* 1988 U.S.C.C.A.N. 2620, 2661-2662 (emphasis added) (citation omitted).

This Congressional acknowledgment that statutes must be construed in light of the trust responsibility was consistent with the following statement from the foremost authority on Federal Indian law regarding the significance of the trust responsibility to the canons of Indian statutory construction:

> The rules for construing federal statutes in Indian affairs have a pervasive influence in Indian law. The canons are variously phrased in different contexts, but generally they provide for a broad construction when the issue is whether Indian rights are reserved or established, and for a narrow construction when Indian rights are to be abrogated or limited. *These canons play an essential role implementing the trust relationship between the United States and Indian tribes* and are involved in most of the subject matter of Indian law.

F. Cohen, *Handbook of Federal Indian Law*, 224-225 (1982).

Nearly a century ago, this Court emphasized that the special rule of construction for Indians is based on the guardian-ward relationship between the United States and Indian tribes as follows:

> . . . doubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor of a weak and defenseless people, *who are wards of the nation, and dependent wholly upon its protection and good faith*. This rule of construction has been recognized, without exception, for more than a hundred years, and has been applied in tax cases.

Choate v. Trapp, 224 U.S. 665 (1912) (emphasis added). More recently, this Court has stated that the canons of construction applicable in Indian law "are rooted in the unique trust relationship between the United States and Indians." *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 247 (1985), *reh'g denied*, 471 U.S. 1062 (1985).

This Court has consistently recognized the Federal government's trust responsibility to Indian tribes. This

Court has held that Congress must carry out the Federal government's fiduciary responsibility to Indian tribes. *See, e.g., Morton v. Mancari*, 417 U.S. 535, 555 (1974); *Delaware Tribal Business Committee v. Weeks*, 430 U.S. 73, 85 (1977), *reh'g denied*, 431 U.S. 960 (1977). This Court has also recognized that the Executive Office must carry out the Federal government's fiduciary responsibility. *Seminole Nation v. United States*, 316 U.S. 286, 297 (1942); *United States v. Creek Nation*, 295 U.S. 103, 110 (1935), *reh'g denied*, 295 U.S. 769 (1935); *Cramer v. United States*, 261 U.S. 219, 232-33 (1923). The trust responsibility includes the responsibility to protect tribes' property rights and right to self-government. While Congress has the power "to control or manage Indian affairs," that power extends to "appropriate measures for protecting and advancing the tribe" and is further "subject to limitations inhering in a guardianship and to pertinent constitutional restrictions." *United States v. Sioux Nation of Indians*, 448 U.S. 371, 415 (1980). In *United States v. Creek Nation*, 295 U.S. at 109-110, this Court stated:

> The tribe was a dependent Indian community under the guardianship of the United States, and therefore its property and affairs were subject to the control and management of that government. *But this power to control and manage was not absolute. While extending to all appropriate measures for protecting and advancing the tribe, it was subject to limitations inhering in such a guardianship and to pertinent constitutional restrictions.* It did not enable the United States to give the tribal lands to others, or to appropriate them to its own purposes, without rendering, or assuming an obligation to render, just compensation

> for them; *for that "would not be an exercise of guardianship, but an act of confiscation."*

Id. at 109-110 (emphasis added) (citations omitted).

In its treatment of the Indian nations, and their property, the United States as trustee must be judged by the most exacting fiduciary standards. *See Seminole Nation v. United States*, 316 U.S. 286 (1942); *United States v. Mason*, 412 U.S. 391 (1973). To accomplish beneficent objects with reference to Indian tribes that, "from their very weakness and helplessness so largely due to the course of dealing of the Federal Government with them . . . there arises the duty of protection, and with it the power." *United States v. Rickert*, 188 U.S. 432, 437-438 (1903), *citing United States v. Kagama*, 118 U.S. 375, 384 (1886). "So that if they may be taxed, then the obligations which the Government has assumed in reference to these Indians may be entirely defeated." *Id.* at 438. "The power to tax involves the power to destroy; the power to destroy may defeat and render useless the power to create." *United States v. Rickert*, 188 U.S. 432, 439 (1903).

In the present case, where the issue is whether the United States, the guardian, intended to tax the gaming revenues of its wards, it is necessary to apply the special rules of Indian statutory construction which arose from that guardian-ward relationship. "[I]t is not lightly to be assumed that Congress intended to tax the ward for the benefit of the guardian." *See Squire v. Capoeman*, 351 U.S. 1 (1956) (construing treaties and General Allotment Act to afford exemption from a Federal capital gains tax on income earned from sale of timber on individual Indian trust property). To the extent ambiguity in a Federal law

exists, the ordinary canons of construction applicable in tax cases requiring strict construction of tax exemptions, shall be reversed in cases involving Indians (*See* Petitioners' Brief at 15-20). Absent an express provision in the IGRA requiring such taxation, and in light of the ambiguity of § 2719(d) (*See* Petitioners' Brief at 12), the guardian-ward relationship mandates that § 2719(d) must be construed in favor of the Indian tribes.

II. The Application of the Special Canons of Construction to Interpretation of § 2719(d) Is Consistent with the Overriding Federal Interest in Indian Self-Determination

A. Executive Office and Congressional Policy of Indian Self-Determination

For more than three decades, the Executive branch has advocated a policy of Indian Self-Determination. President Nixon stated that the United States "acts as a legal trustee for the land and water rights of American Indians" and has a "legal obligation to advance the interests of the beneficiaries of the trust without reservation and with the highest degree of diligence and skill." Exec. Order No. 11,399, 33 Fed. Reg. 4245 (1968). President Reagan established that it is part of the Executive branch's policy that self-government should include reduction of tribal dependence on non-federal funds. *See* President's Statement on Indian Policy, 19 Weekly Comp. Pres. Doc. 98, 99 (Jan. 24, 1983). More recently, President Clinton acknowledged the Government's unique relationship with Native American tribal governments and required that each executive department or agency operates within a "government-to-government" relationship

with federally-recognized tribal governments. Exec. Order No. 13,084, 63 Fed. Reg. 27,6555 (1998).

These Executive Office policies reflect legislative policy changes which began in the 1930's, when Congress halted the assimilation and allotment policy by enactment of the Indian Reorganization Act (IRA), Act of June 18, 1934, 48 Stat. 984 (codified at 25 U.S.C. §§ 461, *et seq.*), and the Oklahoma Indian Welfare Act (OIWA), Act of June 26, 1936, 49 Stat. 1967 (codified at 25 U.S.C. §§ 501, *et seq.*). These laws were enacted in order to provide a fresh start after decades of oppressive Federal administrative policies and actions. The IRA and OIWA ended allotments in severalty, allowed the re-establishment of communal lands, and permitted the organization of tribal governments with control over tribal funds. The IRA and OIWA were part of the government's new policy encouraging the Indian Nations' economic development and self-determination. *See* F. Cohen, *Handbook of Federal Indian Law*, 144-152 (1982). This Court has described the IRA as reflecting "a change in policy, the theory of which is that Indians can better meet the problems of modern life through corporate, group, or tribal action, rather than as assimilated individuals." *Board of County Commissioners v. Seber*, 318 U.S. 705, 716 n.20 (1943), *reh'g denied*, 319 U.S. 782 (1943).

In 1975 Congress enacted the Indian Self-Determination Act, Pub. L. No. 93-638, January 4, 1975, 88 Stat. 2203 (codified in 25 U.S.C. §§ 450, *et seq.*), which authorized the Secretary of the Interior to enter into contracts with Indian tribes to plan, conduct and administer certain programs that the Secretary is authorized to administer for the benefit of Indians. *See* 25 U.S.C. § 450f. In the Act's

policy statement, Congress declared its commitment to maintenance of the Federal government's unique and continuing relationship with and responsibility to the Indian people, through the establishment of a meaningful Indian self-determination policy. 25 U.S.C. § 450a(b). This commitment to Indian self-government was also reflected in other enactments during this same time period. *See* Indian Health Care Improvement Act of 1976, Pub. L. No. 94-437, Sept. 30, 1976, 90 Stat. 1400 (codified at 25 U.S.C. §§ 1601, *et seq.*); Indian Financing Act of 1974, Pub. L. No. 93-362, Apr. 12, 1974, 88 Stat. 77 (codified at 25 U.S.C. §§ 1451, *et seq.*).

During the past decade, Congress has continued to protect the strong Federal policy of tribal self-government and Federal trust responsibility. *See* Native American Housing Assistance and Self-Determination Act of 1996, Pub. L. No. 104-330, Oct. 26, 1996, 110 Stat. 4017 (codified at 25 U.S.C. §§ 4101, *et seq.*); American Indian Agricultural Management Act of 1993, Pub. L. No. 103-177, Dec. 3, 1993, 107 Stat. 2011, (codified at 25 U.S.C. §§ 3701, *et seq.*); Indian Energy Resources Act of 1992, Pub. L. No. 102-486, Title XXVI, §§ 260, *et seq.*, Oct. 24, 1992, 106 Stat. 3113, (codified at 25 U.S.C. §§ 3501, *et seq.*); Indian Tribal Justice Act of 1993, Pub. L. No. 103-176, Dec. 3, 1993, 107 Stat. 2004 (codified at 25 U.S.C. §§ 3601, *et seq.*); and Indian Employment Training and Related Services Demonstration Act of 1992, Pub. L. No. 102-477, Oct. 23, 1992, 106 Stat. 2302 (codified at 25 U.S.C. §§ 3401, *et seq.*).

The enactment of amendments to the Indian Self-Determination Act in 1994 are particularly important to Indian tribes. Pub. L. No. 103-413, October 25, 1994, 108

Stat. 4272. These amendments made the 1988 Tribal Self-Governance Demonstration Project a permanent program. *See* 25 U.S.C. §§ 458aa, *et seq*. The legislative history of the 1994 amendments demonstrates that Congress continues to recognize the unique trust responsibility to Indian nations and the importance of tribal self-governance, as follows:

> Conceptually, Self-Governance reflects the unique relationship between the United States Government and the individual Indian Tribes. Self-Governance recognizes that Tribes are governments with the inherent rights to govern themselves. The Tribal Self-Governance Project was designed to reduce Federal control over decision-making, and to enhance fiscal control, resource allocations, and management at the tribal level.
>
> * * *
>
> The Committee intends the trust responsibility of the United States to Indian Tribes and Indian individuals to be preserved. Self-Governance requires an orderly transition from Federal domination of programs and services benefitting Indians to tribal authority and control over those benefits with an accompanying reduction in the Federal bureaucracy.
>
> A new chapter in Federal-Indian relations is being written by Tribal Self-Governance. Indian Tribes have been and will continue to be permanent governmental bodies *exercising basic powers of government, as of Federal and State governments,* to help meet the needs of their citizens.

S.Rep. No. 103-205, 103rd Congress, 1st Sess. 3, 4, *reprinted in* 1994 U.S.C.C.A.N. 3488 (emphasis added).

These enactments by Congress demonstrate the necessity of the continuing judicial recognition of the United States' Federal trust responsibility to Indian nations and the importance of Indian self-government, including application of special rules of statutory construction to the interpretation of ambiguous Federal laws impacting the rights of Indian tribes and potentially affecting the ability of tribes to effectively raise revenues for tribal government operations and services.

B. Judicial Adherence to the Federal Policy of Indian Self-Determination.

The Internal Revenue Service presupposes the general applicability of their tax code to Indian Nations and places the burden of proving exemption from the tax code upon the Indian Nations. The Internal Revenue Service looks to the United States as the source of Indian sovereignty, assuming that Indian Nations are automatically within their jurisdiction. This is a false assumption. The United States has long recognized that the Indian Nations pre-existed the formation of the United States, and that their powers derive not from the creation of the Federal government or its constituent States, but from the inherent sovereignty of the Indian Nations which, although limited by conquest, exist in their free and unfettered form unless Congress has explicitly and with the clearest language, removed that power. *See Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832), *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831) and *United States v. Wheeler*, 435 U.S. 313 (1978). Indian Tribes have retained many of the powers of self-government that they possessed at the time of their

incorporation into the United States. As stated in *Worcester v. Georgia*, 31 U.S. at 580 (M'Lean, concurring), "[a]t no time has the sovereignty of the country been recognized as existing in the Indians, but they have always been admitted to possess many of the attributes of sovereignty. All the rights which belong to self-government have been recognized as vested in them."

This Court has repeatedly reaffirmed the basic principles originally set forth in the nineteenth century in the *Cherokee Nation* and *Worcester* cases. *See, e.g., Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 509 (1991). "It must always be remembered that the various Indian tribes were once independent and sovereign nations, and that their claim to sovereignty long predates that of our own Government." *McClanahan v. Arizona Tax Commission*, 411 U.S. 164, 172 (1973), *quoting United States v. Kagama*, 118 U.S. 375, 381-382 (1886). The sovereignty retained by tribes includes the power of regulating their internal and social relations. *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 332 (1983), *quoting United States v. Kagama*, 118 U.S. at 381-382 (1886). This authority includes the tribes' power to make their own substantive law in internal matters and to enforce that law in their own forums, *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55 (1978).

Only a year before passage of IGRA, this Court recognized in *California v. Cabazon Band of Indians*, 480 U.S. 202 (1987), that tribal self-government includes the right to engage in economic activity in Indian country through means that specifically include the right to conduct gambling. In *Cabazon*, this Court considered the issue whether Indian tribes are subject to state regulatory prohibition of

gaming in Indian country in light of traditional notions of Indian sovereignty and the congressional goal of Indian self-government, including its "overriding goal" of encouraging tribal self-sufficiency and economic development. *California v. Cabazon Mission Band of Indians*, 480 U.S. at 216, *citing Mescalero Apache Tribe*, 462 U.S. 324, 334-335 (1983). The Court concluded that Indian tribes are not subject to such regulation, and reaffirmed the basic rule concerning *state* taxation of Indian income from activities in Indian country set forth in the *Mescalero* case as follows:

> Even so, *in the special area of state taxation*, absent cession of jurisdiction or other federal statutes permitting it, there has been no satisfactory authority for taxing Indian reservation lands or Indian income from activities carried on within the boundaries of the reservation, and *McClanahan v. Arizona State Tax Comm'n* lays to rest any doubt in this respect by holding that such taxation is not permissible absent congressional consent. *Ibid.*

California v. Cabazon Mission Band of Indians, 480 U.S. at 216 (emphasis added) (cite omitted).

In *Cabazon*, this Court emphasized the importance of the "number of statutes Congress enacted to promote tribal self-government," and found of particular significance the Congressional statements of policy in the Indian Financing Act of 1974, as amended, 25 U.S.C. §§ 1451, *et seq.* and the Indian Self-Determination Act of 1975, as amended, 25 U.S.C. §§ 450, *et seq. Id.* at 217 fn.19. In *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. at 509, this Court cited

Cabazon with approval and found that the Indian Financing Act of 1974 and the Indian Self-Determination Act reflect Congress's desire to promote the goal of Indian self-government, "including the overriding goal of encouraging tribal self-sufficiency and economic development." The Court further stated: "Under these circumstances, we are not disposed to modify the long-established principle of tribal sovereign immunity." *Id.* at 510.

Although the *Cabazon* and *Citizen Band Potawatomi* decisions did not involve construction of an ambiguous Federal statute, this Court's reliance on the strong Congressional expressions of policy regarding Indian self-determination in those cases is instructive. These decisions indicate that great weight also should be afforded to the self-determination policy when construction of ambiguities in Federal laws impacting tribal revenues, such as 25 U.S.C. § 2719(d), is involved. In light of the continuing self-determination policy, this Court should not be disposed to disturb the long-established canons of statutory construction which favor Indian tribes.[4]

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[4] Since the present case turns upon construction of IGRA, § 2719(d), it is not necessary to explore the assumption of the IRS that Indian tribes are not exempt from Federal taxes absent an express tax exemption. However, this view, apparently founded on cases involving taxation issues related to individual trust and restricted lands and special statutes pertaining thereto, such as *Superintendent of Five Civilized Tribes v. Commissioner of Internal Revenue*, 295 U.S. 418 (1935), is not applicable to Federal taxation of Indian tribes. In light of the Federal policy of self-determination and the numerous Federal laws enacted to facilitate Indian self-governance, the better rule is to require express Congressional authorization of Federal taxation of Indian tribes, just as such express Congressional authorization is required for state taxation of tribes. As discussed in more detail in part II.C. of this brief, the legislative history of IGRA indicates the Congressional view that if tribal rights are not explicitly abrogated in the language of IGRA, no such restrictions should be construed. When it enacted IGRA, Congress followed this rule that express authorization of taxation is required, by enacting a provision in IGRA which expressly provides that individual Indians (who under certain limited circumstances receive per capita payments from gaming revenues) are subject to Federal income taxes as ordinary income. 25 U.S.C. § 2710(b)(3)(D). Congress also followed the rule that an express authorization is required in order to assess costs against Indian nations, when it enacted § 2717(a)(1) of IGRA, which requires tribes to pay fees to subsidize the costs of the Federal Indian Gaming Commission based on gross revenues. There is nothing in IGRA expressly requiring Indian tribes to pay the Federal wagering tax. However, rather than addressing broader issues involving Federal tax liability of Indian tribes, the Muscogee Nation agrees with the Petitioners that the most appropriate way of resolving the instant case is to apply the special canons of Indian statutory construction in the interpretation of § 2719(d).

C. Statutory Construction of IGRA § 2719(d) in the Context of Indian Self-Determination

Indian tribes exercise the governmental function of raising revenues through their gaming enterprises. The sale of pull-tabs by Indian tribes is a business of receiving wagers that generates significant revenue necessary to carry out the tribes' official governmental responsibilities. The wagering occupational tax is a tax on the business of receiving wagers. *See* 26 U.S.C. § 4411. If the ambiguity in § 2719(d) of IGRA is not resolved in favor of the tribes, resulting in imposition of a direct tax on the tribes' official governmental activities, tribes will lose

revenue needed to carry out their official governmental responsibilities. Reducing the revenue of Indian tribes interferes with the tribes' ability to exercise self-government. Self-determination and economic development are not within reach if tribes cannot raise revenues and provide employment for their members. *California v. Cabazon Band of Mission Indians*, 480 U.S. at 218-19.

IGRA, 25 U.S.C. § 2710(b)(2)(B), allows tribal expenditure of tribal gaming net revenues only for the following purposes: to fund tribal government operations or programs, to provide for the general welfare of the Indian tribe and its members, to promote tribal economic development, to donate to charitable organization and to help fund operations of local government agencies.

Consistent with this requirement, gaming revenues are used for programs which have historically suffered from significant neglect and under funding by the Federal government. *Report of National Gambling Impact Study Commission*, 104th Cong., 2nd Sess, Chapter 6, Native American Tribal Gambling, 6-6. Gaming revenues are used to support tribal governmental services such as tribal courts, fire protection, law enforcement, water, sewer and solid waste, roads, environmental health, land-use planning and building inspection services, and natural resource management. *Id.* Tribes also use gambling revenues to establish and enhance social welfare programs in the areas of education, housing, substance abuse, suicide prevention, child protection, burial expenses, and youth recreation. *Id.* Tribes have used gaming funds to support the establishment of other economic ventures that will diversify and strengthen the reservation economies. *Id.* Gambling revenues are also used to

support tribal language, history, and cultural programs. *Id.* Gaming enterprises employ tribal members, resulting in drops in high unemployment rates in many Indian communities and a reduction in welfare rolls and other governmental services for the unemployed. *Id.*

The gaming enterprises of Indian tribes are owned, governed, and controlled by the tribes. The imposition of any tax upon tribal enterprises would increase the total cost of playing the games and, by imposing collection, remittance, and record-keeping requirements, would be burdensome upon the tribes. The United States' only interest in imposing such a tax is raising Federal revenue. An interest in raising revenue alone is insufficient to justify taxing this tribal activity. *See Indian Country U.S.A., Inc. v. Oklahoma Tax Commission*, 829 F.2d at 986. The competing sovereign's interest is "particularly minimal when it seeks to raise revenue by taking advantage of activities that are wholly created and consumed within tribal lands and over which it has no control." *Indian Country U.S.A. v. Oklahoma Tax Commission* at 987; *see also Central Machinery Co. v. Arizona State Tax Commission*, 448 U.S. 160, 174 (1980); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. at 343.

There is nothing in IGRA indicating that Congress intended to interfere with the tribal exercise of the governmental function of raising tribal revenue. The ambiguity in § 2719(a) should therefore be resolved in favor of Indian tribes. This view is supported by the legislative history of IGRA. During debate of IGRA a month before its passage, Senator Evans, Vice Chairman of the Senate Committee on Indian Affairs, stated that the bill "was drafted with the full understanding of the principles of

law which guide our relationship with the Indian tribes." He further stated:

> Many long hours were devoted to this legislation to iron out any possible ambiguities, and we hope to have achieved a bill both clear and concise in this regard. *Therefore, if tribal rights are not explicitly abrogated in the language of this bill, no such restrictions should be construed.* This act should not be construed as a departure from established principles of the legal relationship between the tribe and the United States. Instead, this law should be considered within the line of developed case law extending over a century and a half by the Supreme Court, *including the basic principles set forth in the Cabazon decision.*

134 Cong. Rec. 24027 (September 15, 1988) (Statements of Senator Evans) (emphasis added). This statement regarding the intent of Congress was mirrored by the following statement made by Chairman Udall:

> I would expect that the Federal courts, in any litigation arising out of this legislation, would apply the time-honored rule of construction that ambiguities in legislation enacted for the benefit of Indians will be construed in their favor.

134 Cong. Rec. 25377 (September 26, 1988) (Statements of Representative Udall).

In light of Congress's recognition of the overriding Federal interest in promoting Indian self-determination, this Court should apply the special canons of statutory construction applicable to ambiguous Federal legislation, which will result in the conclusion that the Federal wagering tax does not apply to tribal pull-tab operations.

III. The 1988 Indian Gaming Regulatory Act Must Be Considered *In Pari Materia* With the 1988 Amendments of the Indian Self-Determination Act.

The Indian Gaming Regulatory Act was enacted by Congress on October 17, 1988, only twelve days after enactment of the 1988 Indian Self-Determination Act amendments. Pub. L. No. 100-472, Oct. 5, 1988, 102 Stat. 2285. Construction of § 2719(d) of IGRA must therefore be considered in light of the overall legislation plan contained in both IGRA and the 1988 Indian Self-Determination Act amendments. When Congress passes a law affecting Indian tribes, and the same Congress enacts a second law affecting Indian tribes two months later, the two laws must be considered *in pari materia*, and the overall legislative plan must be considered. *See Menominee Tribe of Indians v. United States*, 391 U.S. 404, 410-411 (1968); *Bryan v. Itasca County, Minnesota*, 426 U.S. 373, 390 (1976). The application of the rule of *in pari materia* makes the most sense when statutes were enacted by the same legislative body at the same time. *See Elernbaugh v. United States*, 409 U.S. 239, 243-244 (1972).

In the 1988 amendments of the Indian Self-Determination Act, Pub. L. No. 100-472, Congress amended its declaration of policy in 25 U.S.C. § 450a by adding a sentence at the end of sub-section (b), as follows (emphasis added):

> (b) The Congress declares its commitment to the maintenance of the Federal Government's unique and continuing relationship with, and responsibility to, individual Indian tribes and to

the Indian people as a whole through the establishment of a meaningful Indian self-determination policy which will permit an orderly transition from the Federal domination of programs for, and services to, Indians to effective and meaningful participation by the Indian people in the planning, conduct, and administration of those programs and services. *In accordance with this policy, the United States is committed to supporting and assisting Indian tribes in the development of strong and stable tribal governments,* capable of administering quality programs *and developing the economies of their respective communities.*

One of the primary objectives of the 1988 amendments was the inclusion of indirect costs in funding provided to tribes under the Indian Self-Determination Act. According to the House and Senate Reports, attempts to transfer Federal funds to tribes had been complicated by difficult Federal budget pressures of the past decade, resulting in competition between Federal agencies and tribes for "the same Federal funds to carry out their respective responsibilities." 1988 U.S.C.C.A.N. 2626. The failure of Federal agencies to reimburse tribes for the cost of program operations resulted in a "tremendous drain on tribal financial resources." *Id.* According to the House and Senate Reports:

> The consistent failure of federal agencies to fully fund tribal indirect costs has resulted in financial management problems for tribes as they struggle to pay for federally mandated annual single-agency audits, liability insurance, financial management systems, personnel systems, property management and procurement systems

> and other administrative requirements. Tribal funds derived from trust resources, *which are needed for community and economic development,* must instead be diverted to pay for the indirect costs associated with programs that are a federal responsibility. It must be emphasized that tribes are operating federal programs and carrying out federal responsibilities when they operate self-determination contracts. *Therefore, the Committee believes strongly that Indian tribes should not be forced to use their own financial resources to subsidize federal programs.*

1988 U.S.C.C.A.N. 2627 (emphasis added).

The Report states that it "is clear that tribal contractors are carrying out federal responsibilities." *Id.* at 2645. It further states that actions by Federal agencies to reduce tribal contract funding to pay for various enumerated Federal expenses "frustrate the intent of the Indian Self-Determination Act and are contrary to the purpose of the Act." *Id.* at 2649. "The intent of these amendments is to protect and stabilize tribal programs by protecting and stabilizing the funds for those programs from inappropriate administrative reduction by Federal agencies." *Id.* The Report concludes: "These amendments strengthen the ability of tribes to contract with the Secretary to perform trust-related functions, and to participate with the Secretary in trust responsibility decision-making as equal partners." *Id.* at 2659. Congress addressed the future shortfall with regard to indirect costs by including a new definition of the term "indirect costs" in 25 U.S.C. § 450b(f) and by adding a new § 450j-1, entitled "Contract funding and indirect costs" in the 1988 Indian Self-Determination Act amendments.

Consistent with the policy statements of the 1988 Indian Self-Determination amendments enacted only twelve days before enactment of IGRA, Congress included findings in IGRA that: " . . . a principal goal of Federal Indian policy is to promote tribal economic development, tribal self-sufficiency, and strong tribal government;" and also found that Indian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity. 25 U.S.C. § 2701. Congress further stated its intent in IGRA, to "provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments." 25 U.S.C. § 2702.

The interpretation of § 2719(d) of the IGRA proposed by the IRS is not consistent with the overall legislative plan for strengthening Indian self-government established by Congress in 1988. The policy statements in the two 1988 Acts emphasize the importance of Indian self-determination. The 1988 Indian Self-Determination Act amendments were directed at providing a remedy for Congressional concern that Indian tribes were not being sufficiently funded to carry out Federal trust functions under the Indian Self-Determination Act and that they were forced to use tribal resources to help pay for Federal trust functions. It simply does not make sense that twelve days after enacting a law designed to afford tribes greater self-determination by providing indirect cost funding for carrying out Federal trust functions, Congress could have

intended to further the United States' interests in raising revenues at the expense of tribes by imposing the Federal wagering tax on tribal pull-tab revenues. It cannot be assumed that in enacting IGRA, Congress performed such a useless act.[5] Courts should give effect to both of two statutes covering related or overlapping subjects. *See Boys Markets v. Retail Clerks Union, Local 770*, 398 U.S. 235, 249-50 (1970). In order to give effect to the 1988 Self-Determination Act amendments and to give effect to § 2719(d) of IGRA, this Court must conclude that tribal pull-tab proceeds are not subject to the Federal wagering and occupational taxes.

CONCLUSION

The Internal Revenue Service's focus on regulation for purposes of raising Federal revenue is contrary to the Federal Government's commitment to a policy of Indian

[5] In *United States v. 103 Electronic Gambling Devices*, 223 F.3d 1091 (9th Cir. 2000), the Ninth Circuit considered whether Congress intended to allow the Johnson Act, 15 U.S.C. §§ 1171-1178, which prohibits the possession and operation of any Class III gambling device on Indian land unless authorized by a tribal-state compact, to apply to bingo aids when it enacted IGRA. The Court concluded that reading the Johnson Act to forbid such aids would render § 2703(7)(A)(i) of IGRA, which provides that bingo using "electronic, computer, or other technologic aids" is class II gaming, a nullity. The Court asked why Congress would carefully protect such technologic aids in § 2703(7)(A)(i) of IGRA, "yet leave them to the wolves of a Johnson Act forfeiture action." The Court found that it could not presume that in enacting IGRA, Congress performed such a "useless act." *Id.* at 1102.

self-determination and economic self-sufficiency. The guardian has a responsibility to protect the property of the wards so that it will adequately serve the wards' needs and finally bring them to a state of independence. Interpretation of an ambiguous Federal statute to allow taxation of the wards for the benefit of the guardian is inconsistent with the Federal trust responsibility and the Federal policy of Indian self-determination.

Respectfully submitted,

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IN THE

Supreme Court of the United States

THE CHICKASAW NATION and
THE CHOCTAW NATION OF OKLAHOMA,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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BRIEF OF *AMICI CURIAE* SHAKOPEE MDEWAKANTON SIOUX (DAKOTA) COMMUNITY and LITTLE SIX, INC. IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICI CURIAE*[1]

The Shakopee Mdewakanton Sioux (Dakota) Community is a federally recognized Indian tribal government. Little Six, Inc. is an arm and instrumentality of the Community established to operate the Community's gaming operations, which are conducted under the Community's powers of self-government and under authority of federal law to raise revenues for the tribal government. The Community and Little Six are sometimes referred to collectively as the "Community."

The Community and Little Six are the Respondents in *United States v. Little Six, Inc., et al.*, No. 00-1115, petition for certiorari pending. In *Little Six*, a unanimous panel of the United States Court of Appeals for the Federal Circuit held in a straightforward and well-reasoned opinion that the 0.25% excise tax and the related $50 annual occupational tax imposed under Sections 4401(a)(1) and 4411 in Chapter 35 of the Internal Revenue Code (the "Code") do not apply to pull-tab games or other lotteries conducted by Indian tribal governments under the Indian Gaming Regulatory Act, 25 U.S.C. § 2701 *et seq.* (1994 & Supp. 1997) ("IGRA").[2] 210 F.3d 1361 (Fed. Cir. 2000), reproduced at Pet. App. at 101a.

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1. Pursuant to this Court's Rule 37.6, *amici* state that no counsel for any party authored this brief in whole or in part, and no person or entity other than *amici*, its members, or their counsel made a monetary contribution to the preparation or submission of the brief. *Amici* have secured the consent of all parties to the filing of this brief, and these consents are being filed with the Clerk of the Court.

2. Pull-tab games are a form of lottery in which individuals purchase one or more pull-tab cards from a set of such cards. Pull-tab cards are essentially indistinguishable from the scratch-off lottery tickets sold by many states.

The Federal Circuit grounded its decision on Section 2719(d) of IGRA, which provides (with emphasis supplied by the court, *see* 210 F.3d at 1365):

> (1) The provisions of the Internal Revenue Code of 1986 (including sections 1441, 3402(q), 6041, and 6050I, *and chapter 35 of such Code*) concerning the reporting and withholding of taxes with respect to the winnings from gaming or wagering operations *shall apply to Indian gaming operations* conducted pursuant to this chapter, or under a Tribal-State compact entered into under section 2710(d)(3) of this title that is in effect, *in the same manner as such provisions apply to State gaming and wagering operations*.
>
> (2) The provisions of this subsection shall apply notwithstanding any other provision of law enacted before, on, or after October 17, 1988, unless such other provision of law specifically cites this subsection.

The court concluded that, because Chapter 35 provides an exemption for state lotteries (in its Section 4402(3)) and is one of the specific Code provisions which Section 2719(d) explicitly provides "shall apply to Indian gaming operations . . . in the same manner as such provisions apply to State gaming and wagering operations," Section 2719(d) should be construed to provide an exemption for pull-tab games and other lotteries conducted by Indian tribes. Pet. App. at 108a.

In the present case, the United States Court of Appeals for the Tenth Circuit held that the Chapter 35 taxes *do* apply to tribal pull-tab games and other lotteries, and this Court has granted certiorari to resolve the conflict between the

Tenth Circuit and the Federal Circuit regarding the applicability of the Chapter 35 taxes. The Court has not ruled on the United States's certiorari petition in *Little Six*, apparently holding the case for disposition in light of its decision here.

The Community and Little Six, parties to *Little Six*, have a compelling and obvious interest in the outcome of this case involving the construction of Section 2719(d) of IGRA. The construction question arises because there is an ambiguity in the statute resulting from the inconsistency between Section 2719(d)'s reference to "provisions . . . concerning the reporting and withholding of taxes [from] winnings" and its explicit references to Section 6050I and Chapter 35, which do not relate to winnings. Petitioners' brief focuses most of its attention on the important Indian canon of construction, which requires that the ambiguity in Section 2719(d) be resolved in favor of the reasonable construction advocated by the tribal governments and adopted by the Federal Circuit. *E.g.*, *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, 502 U.S. 251 (1992); *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759 (1985); *Squire v. Capoeman*, 351 U.S. 1 (1956) (federal tax case); *Choate v. Trapp*, 224 U.S. 665 (1912); *see also Cook v. United States*, 86 F.3d 1095, 1097 (Fed. Cir.) (federal tax case applying rule that statutes or treaties that contain language that reasonably can be construed to confer a federal tax exemption for Indian tribes or Indians should be so construed in their favor), *cert. denied*, 519 U.S. 932 (1996); *Kirschling v. United States*, 746 F.2d 512, 515 (9th Cir. 1984) (same); *Holt v. Commissioner*, 364 F.2d 38, 40 (8th Cir. 1966) (same), *cert. denied*, 386 U.S. 931 (1967). While the Indian canon provides an independent basis for deciding this case in favor of the Chickasaw and Choctaw Nations, the Community will demonstrate in this brief that the Federal Circuit's construction is the correct construction even without the Indian canon, based on the language of Section 2719(d),

IGRA's overall statutory scheme and purpose, and the relevant legislative history. In addition, the Community wishes to provide the Court with background information regarding Indian gaming and the federal wagering taxes that it believes the Court will find helpful in deciding this case.

STATEMENT REGARDING HISTORY OF INDIAN GAMING AND THE FEDERAL WAGERING TAXES

As state governments did with state lotteries, Indian tribal governments began to conduct bingo, pull-tab games, and other gaming on reservation and trust lands in the late 1970s and early 1980s to raise critically-needed revenues and provide jobs for their tribal communities. S. Rep. No. 446, 100th Cong., 2d Sess. 2-3 (1988), *reprinted in* 1988 U.S. Code Cong. & Admin. News 3071, 3072-73 ("IGRA Report"); *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 218-19 (1987). In several decisions culminating with this Court's decision in *Cabazon* in 1987, the federal courts repeatedly rejected attempts by state governments to subject Indian gaming to state laws. The courts held that, except in the limited circumstances in which state law has criminalized a game entirely, Indian gaming is subject only to the tribes' powers of self-government and the authority of federal law. *Cabazon*, 480 U.S. 202; *Barona Group of Capitan Grande Band of Mission Indians v. Duffy*, 694 F.2d 1185 (9th Cir. 1982), *cert. denied*, 461 U.S. 929 (1983); *Seminole Tribe of Florida v. Butterworth*, 658 F.2d 310 (5th Cir. 1981), *cert. denied*, 455 U.S. 1020 (1982); *Mashantucket Pequot Tribe v. McGuigan*, 626 F. Supp. 245 (D. Conn. 1986); *Oneida Tribe of Indians of Wisconsin v. Wisconsin*, 518 F. Supp. 712 (W.D. Wis. 1981). The Community commenced its pull-tab games in 1982.

From its beginnings, Indian gaming has been conducted with encouragement, financial support, and regulatory oversight from the federal government. As this Court

recognized in *Cabazon*, 480 U.S. at 217 & n. 20, President Reagan's 1983 Statement on Indian Policy addressed the critical importance of tribal revenue-raising to the federal government:

> It is important to the concept of self-government that tribes reduce their dependence on Federal funds by providing a greater percentage of the cost of their self-government.

19 Weekly Comp. of Pres. Doc. 99 (1983). The Department of the Interior sought to implement this federal policy by promoting tribal gaming:

> A number of tribes have begun to engage in bingo and similar gambling operations on their reservations for the very purpose enunciated in the President's Message. Given the often limited resources which tribes have for revenue-producing activities, it is believed that this kind of revenue-producing possibility should be protected and enhanced.

Policy Directive of Assistant Secretary of the Interior for Indian Affairs (Mar. 2, 1983); *see Cabazon*, 480 U.S. at 217 & n. 21 (also noting that Department of the Interior "has the primary responsibility for carrying out the Federal Government's trust obligations to Indian tribes").

In the fall of 1988, Congress enacted the Indian Gaming Regulatory Act, Pub. L. No. 100-497, 102 Stat. 2467 (Oct. 17, 1988), *codified as amended at* 25 U.S.C. § 2701 *et seq.* (1994 & Supp. 1997) ("IGRA"), to further foster the tribal governments' revenue-raising efforts. IGRA Report at 2-3, 12. IGRA codified this Court's decision in *Cabazon*. 25 U.S.C. §§ 2710(b)(1)(A), (d)(1)(B); IGRA Report at 17. IGRA's stated central purpose is "to provide a statutory basis

for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments. . . .," 25 U.S.C. § 2702(1), three longstanding goals of federal Indian law. *See Cabazon*, 480 U.S. at 216 (discussing these congressional policy goals and several federal statutes enacted to promote these goals); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 335 n.17 (1983) (same).

Pull-tab games are a form of "Class II gaming" under IGRA's regulatory scheme. Class II gaming must be conducted in conformance with IGRA's requirements and is subject to the primary regulatory jurisdiction of Indian tribal governments and federal oversight by the National Indian Gaming Commission ("NIGC").[3] Under IGRA, as long as the state within which an Indian tribe is located permits bingo games for any purpose by any person, organization, or entity, state governments have no power to apply their laws to, or otherwise regulate, either bingo gaming conducted by tribal governments on tribal lands or pull-tab gaming conducted by such governments in the same location as the bingo gaming. 25 U.S.C. §§ 2703(7)(A)(i), 2710(b)(1)(A).

3. IGRA draws a distinction between "Class I," "Class II," and "Class III" gaming conducted on tribal lands. Class I gaming, consisting of purely social games or traditional ceremonial games, is subject to exclusive regulation by Indian tribal governments. Class II gaming, consisting primarily of bingo, pull-tabs, other games similar to bingo, and certain card games must be conducted in conformance with both IGRA and tribal law and is subject to federal oversight by the NIGC. Class III gaming, consisting of games not defined as Class I or Class II gaming, including blackjack and other banking card games, video games of chance, and slot machines, is subject to negotiation with the state governments under a tribal-state compact approved by the Secretary of the Interior. Class III gaming conducted pursuant to an approved tribal-state compact must be conducted in conformance with IGRA, tribal law, and the compact, and is subject to federal oversight by the NIGC. *See* 25 U.S.C. §§ 2703(3), (6), (7), & (8), 2710.

Section 4401(a)(1), imposing the 0.25% wagering excise tax at issue here, was enacted in a 1982 amendment to Chapter 35 of the Code lowering the tax rate from 2% on the wagers to which it applied.[4] That section taxes "wagers authorized under the law of the State in which accepted." Indian gaming is federally-authorized gaming, not state-authorized gaming, and it is apparent that Congress did not have Indian gaming in mind when it enacted Section 4401(a)(1). Indeed, Senator Cannon of Nevada, the original co-sponsor with Senator Laxalt of Nevada of the legislation resulting in this enactment, informed the Senate that the only gaming operations to which the federal wagering taxes then applied, other than illegal operations, were conducted by private, *nongovernmental* operators of sports and horse bookmaking in Nevada. 127 Cong. Rec. S2270 (Feb. 17, 1981). Similarly, in the floor debate on the same legislation, Senator Biden described the wagering taxes as applying to "legal bookies" and "illegal bookies," *id.* at S32086 (Dec. 16, 1981), not tribal governments.[5]

4. Under Section 4411's explicit terms, the $50 annual occupational tax applies to tribal governments only if the 0.25% excise tax so applies.

5. Congress passed the 1982 legislation enacting the 0.25% tax over the objection of the Treasury Department. In both the Carter and the Reagan administrations, the Treasury Department advocated the complete abolition of the wagering taxes, because they raise only "extremely minor" revenues from the perspective of the federal government and are a poor tool for enforcing the criminal gambling laws and therefore no longer serve their original purpose. *See* 127 Cong. Rec. S2270-71 (Feb. 17, 1981), S32084-85 (Dec. 16, 1981). The taxes raised revenues of only just over $12 million in fiscal year 1980, only a small fraction of the $400 million in annual revenues that was estimated when the taxes were first enacted in 1951. *Id.* at S2270-71. By fiscal year 1999, the wagering excise tax raised only $13.8 million, even less than the $19.8 million raised by the excise tax on bows and arrows and far less than the $6.6 billion and $21.2 billion raised by the excise taxes on air transportation and gasoline, respectively. *See* file 00EX20TE.EXE.

In enacting IGRA in 1988, Congress for the first time directly addressed the applicability of the Chapter 35 taxes to tribal governments. Section 2719(d) of IGRA, the construction of which is at issue here, specifically includes Chapter 35 among the Code provisions which "shall apply to Indian gaming operations . . . in the same manner as such provisions apply to State gaming and wagering operations." Section 4402(3) in Chapter 35 provides an exemption from the Chapter 35 taxes for wagers placed in state-conducted lotteries. Congress enacted IGRA and its Section 2719(d) instead of competing Indian gaming legislation that would have amended the Code to *impose* the Chapter 35 taxes on tribal governments. *See* H.R. 3605, § 10(2), 100th Cong., 1st Sess. (Nov. 3, 1987); S. 1841, § 10(2), 100th Cong., 1st Sess. (Nov. 4, 1987).

It was not until 1991, nine years after enactment of Section 4401(a)(1) of the Code and three years after enactment of Section 2719(d) of IGRA, that anyone, anywhere, ever suggested that the Chapter 35 taxes applied to tribal governments. That was the year that two IRS examining agents, in a field audit of the Community and in a concurrent field audit of another Indian tribe, developed their position proposing that the federal wagering taxes apply to the tribes. As soon as the IRS agents made their novel proposal, Senator Inouye, the Chairman of the Senate Select Committee on Indian Affairs at that time, the primary author of IGRA, and the recognized leader in Congress on matters of federal Indian law, wrote a letter to IRS Commissioner Fred Goldberg on December 12, 1991, explaining that Congress intended in Section 2719(d) that tribal governments would be treated the same as the states for purposes of Chapter 35 of the Code. Pet. App. at 112a.

On April 2, 1992, the IRS National Office issued Technical Advice Memorandum 9229005 (the "TAM")

adopting the IRS examining agents' proposal. The TAM constituted the first public statement of the IRS position, only just then developed, that tribal governments are subject to the federal wagering taxes, even though the tribes had by then been conducting pull-tab games to raise government revenues for ten or more years.

The only tribal games to which the IRS has attempted to apply the federal wagering taxes are pull-tab games, because "live games" such as bingo and blackjack are excluded from the definitions of taxable "wagers" and "lotteries" in Section 4421 of the Code and slot machines are exempt from the taxes under Section 4402(2) of the Code. Even though the federal wagering taxes are narrow in scope, their imposition works a heavy financial burden on most affected tribal governments and, indirectly, on the federal government charged with trust obligations to the tribes. As Congress noted in enacting IGRA, tribal gaming income "often means the difference between an adequate governmental program and a skeletal program that is totally dependent on Federal funding." IGRA Report at 3. Particularly for tribes dependent solely on bingo and pull-tabs to raise tribal revenues, each dollar lost to the federal wagering taxes is an important dollar lost for tribal programs.

SUMMARY OF ARGUMENT

The language of Section 2719(d) of IGRA, IGRA's overall scheme and purpose, and the relevant legislative history all support construction of Section 2719(d) to provide Indian tribes with the same exemption from federal wagering taxes provided to the states in Chapter 35 of the Code.

The language of Section 2719(d) is ambiguous, because its reference to "winnings" is inconsistent with its specific inclusion of Chapter 35 and Section 6050I, two Code provisions which have nothing to do with winnings, among

the Code provisions to be applied to Indian gaming operations in the same manner as to states. In *Little Six*, the Federal Circuit properly concluded that the tribal governments' construction giving effect to Congress's explicit reference to Chapter 35 is a more reasonable construction of the statutory language than the United States's construction reading that reference out of the statute. Giving effect to Congress's explicit reference to Chapter 35 follows the rule that all parts of a statute are to be given effect if possible. It also effectuates Congress's intent that Indian tribes would benefit from any favorable treatment of state gaming operations provided in the Code sections referenced in Section 2719(d), given the governmental nature of both Indian and state gaming. The Tenth Circuit's contrary construction of Section 2719(d) in the present case hinged on its conclusion, adopted at the United States's suggestion and without analysis, that Section 2719(d)'s reference to "Chapter 35" was intended to refer *only* to Section 4421 of that chapter, to incorporate Section 4421's definitions of "wager" and "lottery" for purposes of the winnings provisions in Section 2719(d). Even a cursory review of the language of Section 2719(d), Section 4421, and the winnings provisions shows that the Tenth Circuit's conclusory effort to harmonize the references to "Chapter 35" and "winnings" is patently unreasonable.

Giving effect to Congress's explicit reference to Chapter 35 also promotes Congress's purposes in enacting IGRA and is consistent with IGRA's overall scheme, factors which must be positively considered in construing ambiguous statutes. The Federal Circuit's reading of Section 2719(d) to provide tribal governments with the same exemption provided to the states in Chapter 35 furthers Congress's central purpose in enacting IGRA of fostering the tribes' revenue-raising efforts. The Tenth Circuit's reading, by contrast, impedes those efforts.

Other provisions of IGRA also support the Federal Circuit's construction of Section 2719(d), including the provisions throughout the statute which treat tribes and states as co-equal sovereigns and the special fee provision in Section 2717. In the latter section, Congress imposed a fee on tribal pull-tab games and other Class II gaming, based on gross revenues, to cover the federal government's costs of administering the statute. If Congress had understood that tribal pull-tab games would be subject to the federal wagering taxes on the same gross revenues, this likely would have been the subject of discussion in the legislative history, but there was no such discussion. Instead, Congress included Chapter 35 among the specific Code provisions to be applied to tribes in the same manner as to states and provided for an entirely different cost covering fee in Section 2717.

Finally, the construction of Section 2719(d) advocated by the tribal governments and adopted by the Federal Circuit is supported by the legislative history of that provision. Congress's specific inclusion of Chapter 35 among the Code provisions to be applied to tribes in the same manner as to states reflected a consistent intention, dating back to the earliest version of the provision considered in Congress, that the tribes would share the states' exemption from the Chapter 35 taxes. The United States has contended that the deletion of "taxation" from the bill language is conclusive evidence that Congress did not so intend, but this contention is unreasonable given Congress's simultaneous addition of "Chapter 35," which had been used interchangeably with "taxation," to the statutory text. In deleting the reference to "taxation," the statute's drafters appeared to be responding to tribal concerns that Section 2719(d) would be misconstrued to *impose* federal taxes on tribes. By eliminating the word "taxation" and instead specifically referring to Chapter 35, these concerns could be alleviated while still providing the tribes with the same exemption from wagering taxes enjoyed by the states.

The statutory language, IGRA's overall scheme and purposes, and the legislative history all point to the correctness of the Federal Circuit's construction of Section 2719(d), even without the Indian canon of construction. And as the Nations ably demonstrate in their brief, the Indian canon provides an additional basis for giving effect to Congress's explicit reference to Chapter 35.

ARGUMENT

A. The Federal Circuit's Construction of Section 2719(d) is the Most Reasonable Construction of the Statutory Language.

The Federal Circuit began its analysis in *Little Six* by focusing on the language of Section 2719(d), Pet. App. at 108a, which specifically includes "Chapter 35" among the Code provisions under which Indian gaming operations are to be treated the same as those run by a state. Chapter 35 is the chapter of the Code which imposes the federal wagering taxes at issue. Section 4402(3) of Chapter 35 exempts states from the federal wagering taxes for wagers placed in state-conducted lotteries, thus treating state governments more favorably than private, commercial gaming operators. Accordingly, Congress's explicit reference in Section 2719(d) to "Chapter 35" as being among the Code provisions which "shall apply to Indian gaming operations . . . in the same manner as such provisions apply to State gaming and wagering operations" reflects an intention to exempt Indian gaming operations from the federal wagering taxes for wagers placed in tribally-conducted lotteries, including pull-tab games. *Id.*

The United States had contended that Section 2719(d) only involves provisions concerning the reporting and withholding of taxes with respect to winnings. The Federal Circuit, however, recognized the inconsistency between

Section 2719(d)'s reference to "provisions . . . concerning the reporting and withholding of taxes [from] winnings" and its explicit references to Chapter 35 and Section 6050I, which do not relate to winnings. Pet. App. at 109a. Chapter 35 taxes only the operator of the gaming facility, not the players, and the tax is based on gross wagers, not winnings. Section 6050I requires a gaming operator to report cash receipts of $10,000 or more. It does not require reporting of cash payments to players, and therefore also is unrelated to "winnings."[6]

Based on the statutory language alone, the Federal Circuit properly found the Community's construction more reasonable than the United States's construction, Pet. App. at 109a, because the Community's construction gives effect and meaning to all of the statute's terms, whereas the United States's construction would render the explicit references in the statute to Section 6050I and Chapter 35 superfluous, a result that courts must attempt to avoid under well-established principles of statutory construction. *E.g.*, *Bailey v. United States*, 516 U.S. 137, 145 (1995); *Fidelity Federal Savings & Loan Association v. de la Cuesta*, 458 U.S. 141, 163 (1982) (referring to the "well-settled rule that all parts of a statute, if possible, are to be given effect"); *see* Pet. App. at 108a-109a.

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6. Thus, only three of the five sections of the Code referred to in Section 2719(d) fit within the literal limits of the "winnings" phrase. Section 1441 of the Code requires payors to withhold 30 percent of all income paid to nonresident aliens, including certain gambling winnings. Section 3402(q) requires payors to withhold a percentage of certain gambling winnings of persons not subject to withholding under Section 1441. Section 6041, as interpreted in Treasury Regulations promulgated in 1977, requires payors to report to the IRS payments of certain gambling winnings made during the course of a year. *See* 26 C.F.R. § 7.6041-1 (2000).

Under the Federal Circuit's interpretation, Sections 1441, 3402(q), and 6041, the referenced Code provisions concerning winnings, will be applied to Indian gaming operations in the same manner as to state gaming operations to ensure that players will report and pay income tax on their winnings. Section 6050I, which does not concern winnings, will be applied to require the tribes to file an IRS Form 8300 reporting cash receipts from any player in excess of $10,000.[7] Finally, Chapter 35, which does not concern winnings, will be applied to provide Indian gaming operations with the same exemption from federal wagering taxes that is provided to state lotteries under Chapter 35.

Giving effect to Congress's explicit reference to Chapter 35 is particularly important in light of its use of the clause "in the same manner as such provisions apply to State gaming and wagering operations." Congress presumably included that clause to ensure that Indian gaming operations would benefit from any *favorable* treatment of state gaming operations provided in the Code sections referenced in Section 2719(d), given the governmental nature of both Indian and state gaming. Only two of the five referenced Code sections provide the states with more favorable rules than

7. The IRS has disregarded the literal limits of the "winnings" language to apply Section 6050I to Indian gaming operations. IRS, *Indian Assistance Handbook* 31 (May 1996). The United States sought to justify this disregard in *Little Six* by contending that Section 2719(d) "include[s] reporting requirements with respect to receipts as well as winnings (although only 'winnings' is in the statute)." Brief for the Appellee, the United States, dated Sept. 3, 1999 ("U.S. Fed. Cir. Brief"), filed in Fed. Cir. No. 99-5083, p. 25 n. 8. As the Federal Circuit recognized, it is disingenuous for the United States to contend that the presence of the "winnings" phrase is conclusive in evaluating the effect of the reference to Chapter 35 but not conclusive in evaluating the effect of the reference to Section 6050I.

private, commercial operators, with the more significant favorable rule provided in Chapter 35.[8]

At the suggestion of the United States and without analysis, the Tenth Circuit attempted to harmonize Section 2719(d)'s references to "Chapter 35" and "winnings" by concluding that the reference to Chapter 35 was intended merely to incorporate the definitions of "wager" and "lottery" in Section 4421 of Chapter 35. Pet. App. at 25a. The United States elaborated on its position on this point in its petition for rehearing *en banc* in *Little Six*, contending that Section 2719(d)'s incorporation of Section 4421's definitions would ensure that the winnings provisions (*i.e.*, Sections 1441, 3402(q), and 6041) apply to "all forms" of wagers and lotteries as defined in Section 4421 and not just "more traditional, well-known gaming operations." Petition for Rehearing En Banc by Appellee, the United States, dated June 2000 ("U.S. Rehearing Petition"), filed in Fed. Cir. No. 99-5083, p. 8. This "explanation" for Section 2719(d)'s reference to "Chapter 35" is belied by the language of both Section 2719(d) and Section 4421, as well as by the language of the winnings provisions themselves.

Section 2719(d) provides that the *entire* Chapter 35, not just Section 4421 thereof, shall be applied to Indian gaming operations in the same manner as to the states. Chapter 35's central feature involving states, of course, and the one that Congress presumably had in mind in providing for equal

8. The other referenced Code section treating states more favorably than private operators was Section 3402(q). When IGRA was enacted, Section 3402(q)(3)(B) provided states with a $5,000 minimum level of lottery winnings with respect to which income tax withholding was required, rather than the $1,000 minimum level that applied to other lotteries under Section 3402(q)(3)(C). Section 3402(q) has been amended since the enactment of IGRA to equalize the minimum level for withholding at $5,000 for both states and private operators.

treatment of tribes and states for purposes of Chapter 35, is the exemption from the Chapter 35 taxes provided in Section 4402(3) for state lotteries. Section 4421, on the other hand, states explicitly that its definitions of "wager" and "lottery" apply *only* "for purposes of this chapter [*i.e.*, Chapter 35]," not for purposes of Section 2719(d) of IGRA or any other statutory provisions.

The winnings provisions themselves bear out the separateness of Chapter 35's definitional provisions. Each of the winnings provisions referenced in Section 2719(d) applies to its own uniquely defined universe of wagers, each considerably different from the "wagers" and "lotteries" defined in Section 4421 of Chapter 35. For example, Section 4421's definitions of "wager" and "lottery," which *exclude* bingo and keno games because they are "live" games, do *not* apply under Section 1441, which *requires* withholding from nonresident aliens' winnings in bingo and keno games, or under Section 6041, which *requires* reporting to the IRS of U.S. citizens' and U.S. residents' winnings in bingo and keno games over certain dollar thresholds. 26 C.F.R. § 7.6041-1. Thus, the Tenth Circuit's construction of the reference to "Chapter 35" as referring only to Section 4421 to incorporate Section 4421's definitions for purposes of Sections 1441, 3402(q), and 6041, is patently unreasonable.[9]

9. The United States made several equally unpersuasive attempts at various stages of the *Little Six* case to harmonize the references to "Chapter 35" and "winnings." In its latest attempt, made in its petition for rehearing *en banc*, the United States maintained that Chapter 35 contains provisions in Sections 4403 and 4412 which are "at least arguably related to reporting and withholding requirements in that they deal with matters of tax administration, not tax liability," whereas the taxing provisions in Chapter 35 are not so related. U.S. Rehearing Petition p. 9 n.5. Section 4403 imposes a record-keeping requirement on each person liable for the Chapter 35 excise tax. Section 4412 imposes a registration requirement on each person liable for the Chapter 35 occupational tax. Even if these provisions may be "arguably related

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The United States contended in *Little Six* that if Congress had intended to create an exemption from the Chapter 35 taxes for tribes, it would have done so within the "existing statutory frameworks" of Section 4402 or 7871 of the Code[10] rather than in an Indian affairs statute, but this speculation ignores both history and the language of Section 2719(d). Congress has enacted numerous statutes relating to taxes which are not contained in the Code, particularly in the area of Indian affairs. Title 25 of the United States Code, codifying

(Cont'd)
to" reporting and withholding requirements, they are not provisions concerning "the reporting and withholding of taxes [from] winnings." Thus, this explanation failed to harmonize the "Chapter 35" and "winnings" references. More important, the states are exempt from the requirements of Sections 4403 and 4412, because they are exempt from the Chapter 35 taxes under Section 4402(3). It would make no sense to construe Section 2719(d) to treat Indian gaming operations as states for purposes of Sections 4403 and 4412, exempting them from the record-keeping and registration requirements, unless Section 2719(d) also was intended to treat Indian gaming operations as states for purposes of Section 4402(3)'s tax exemption provision.

Even Judge Dyk's dissent from the denial of rehearing in *Little Six* conceded "there is no way to reconcile" the references to "Chapter 35" and "winnings." Appendix A to Brief for the United States on petition for certiorari at 3a. His solution to the construction question, however, was to discard Section 2719(d)'s reference to Chapter 35 as surplusage, violating the rule that all statutory language must be given effect if possible, construing the statute in a manner inconsistent with IGRA's stated purposes, entire structure, and legislative history, and, of course, also violating the Indian canon of construction. Even though Judge Dyk concluded that the "legislative history here provides no clear guidance" regarding the proper construction of the statute, *id.* at 7a, under these circumstances Judge Dyk should have applied the Indian canon.

10. Section 4402 in Chapter 35 sets forth various exemptions from the Chapter 35 taxes, including the exemption in Section 4402(3) for state lotteries. Section 7871 enumerates several provisions of the Code with respect to which "[a]n Indian tribal government shall be treated as a State," including certain excise tax provisions.

IGRA and most of the numerous federal Indian statutes, includes eighty or more provisions regarding federal tax exemptions and other federal tax matters. *E.g.*, 25 U.S.C. §§ 117b, 500g, 645, 1185, and 1407 (1994). Even more to the point here, Congress's inclusion of subparagraph (2) in Section 2719(d), providing that "[t]he provisions of this subsection shall apply notwithstanding any other provision of law enacted before . . . October 17, 1988," underscores the fact that Section 2719(d)'s provisions apply notwithstanding any "existing statutory frameworks." Indeed, Congress obviously was mindful of Section 7871 in referring to "any other provision of law enacted before . . . October 17, 1988" in subparagraph (2), because Congress evidently patterned Section 2719(d)(1) after Section 7871 in enumerating Code provisions which shall apply to Indian gaming operations in the same manner as to states.

Like the Tenth Circuit's failed attempt to harmonize the "Chapter 35" and "winnings" references, the United States's speculation that Congress would have amended the Code if it intended to treat tribes like states for purposes of Chapter 35 ignores the relevant statutory language. Only the Federal Circuit, in *Little Six*, has given proper effect to the language of Section 2719(d).

B. The Federal Circuit's Construction of Section 2719(d) Is Consistent with the Stated Purposes and Entire Structure of IGRA.

When construing an ambiguous statute, the Court must "look not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy." *Crandon v. United States*, 494 U.S. 152, 158 (1990). The Federal Circuit's reading of Section 2719(d) to give effect to Congress's explicit reference to Chapter 35 as a whole promotes Congress's purposes in enacting IGRA and is consistent with IGRA's entire structure, whereas the Tenth

Circuit's reading — as if Chapter 35 as a whole were not mentioned — frustrates those purposes and is inconsistent with that structure. The Federal Circuit's reading, therefore, is the appropriate reading under *Crandon*'s principles.

Congress's central purpose in enacting IGRA was "to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments." 25 U.S.C. § 2702(1). Gaming promotes these goals for one obvious reason: it provides tribal governments with a mechanism for raising critically needed tribal revenues.

Not surprisingly given these goals, there is no indication anywhere in the statute that IGRA was intended as a general revenue raising measure for the federal government. Rather, it is clear that IGRA was enacted to foster the tribes' efforts to raise their *own* government revenues:

> [B]ingo revenues have enabled tribes, like lotteries and other games have done for State and local governments, to provide a wider range of government services to tribal citizens and reservation residents than would otherwise have been possible. . . . [F]or those tribes that have entered into [gaming operations], the income often means the difference between an adequate governmental program and a skeletal program that is totally dependent on Federal funding.
>
> * * *
>
> The Committee views tribal gaming as governmental gaming, the purpose of which is to raise tribal revenues for member services.

IGRA Report at 2-3, 12.

> From time immemorial, Tribes have been and will continue to be permanent governmental bodies exercising those basic powers of government, as do Federal and State governments, to fulfill the needs of their members.

Id. at 34 (additional views of Senator McCain). In construing Section 2719(d), the Court should prefer the reading that more effectively furthers Congress's central purpose of fostering the tribal governments' revenue-raising efforts, providing tribes with the same exemption from wagering taxes that is provided to the states.

Other provisions of IGRA support this reading as well. Section 2717 of IGRA, 25 U.S.C. § 2717, is especially pertinent. In that section, Congress imposed a special fee on tribal pull-tab games and other Class II gaming operations, at rates ranging from 0.5 percent to 5 percent of gross revenues, for the purpose of funding the operations of the National Indian Gaming Commission, the federal regulatory agency charged with oversight of Indian gaming.[11] If Congress had understood or intended that tribal pull-tab games would be subject to the federal wagering excise tax on the same gross revenues, additional assessment of a fee to fund the NIGC either would not have been necessary or at least would have been the subject of discussion in the legislative history concerning whether to impose both the taxes and the fee, but there was no such discussion. *See, e.g., Gaming Activities on Indian Reservations and Lands: Hearing before the Select Comm. on Indian Affairs, United States Senate on S. 555 and S.1303*, 100th Cong., 1st Sess. 98, 113-15, 285, 478 (June 18, 1987) ("IGRA Hearings"). In fact, there is no support in the legislative history for an interpretation that IGRA was intended as a revenue raising

11. Congress amended Section 2717 in 1997 to subject Class III gaming to the special fees and to increase the total annual fees from $1,500,000 to $8,000,000. Pub. L. No. 105-83, Title I, § 123(a)(1), (2)(A), (B), 111 Stat. 1566 (Nov. 14, 1997).

measure for the federal government, only that the federal government was interested in covering the costs of administering the statute. *See, e.g., id.* at 98. Indeed, the Executive Branch agencies supported the fee concept precisely because there were no federal taxes imposed on tribal gaming operations:

> There will be no collection of Federal taxes on the Indian gambling enterprise; [therefore] only a very limited amount of our tax money should be paid out in order to regulate it.

Hearings before the Select Comm. on Indian Affairs, United States Senate on S. 902, 99th Cong., 2d Sess. 48-49 (June 17, 1986) (testimony of Deputy Attorney General Victoria Toensing regarding position of Justice and Interior Departments). Had Congress wished to use Chapter 35 to cover the federal government's regulatory costs, it certainly could have done so, but that chapter's inclusion in Section 2719(d) coupled with an entirely different cost covering fee in Section 2717 provides additional evidence that Congress intended that Indian gaming operations would share the states' exemption from the Chapter 35 taxes.

Finally, IGRA repeatedly makes clear that tribes and states are to be treated as co-equal sovereigns for gaming purposes. *See, e.g.*, 25 U.S.C. § 2710(a) (tribes have exclusive jurisdiction to regulate Class I gaming and primary jurisdiction to regulate pull-tab games and other Class II gaming, with no involvement by the states); 25 U.S.C. § 2710(d) (tribes and states to negotiate compacts for Class III gaming); *see also* IGRA Report at 13 ("The Committee concluded that the compact process is a viable mechanism for sett[l]ing various matters between two equal sovereigns."). As the Federal Circuit recognized, equation of the tribes and the states for purposes of the Chapter 35 taxes is consistent with their status under IGRA as co-equal sovereigns. Pet. App. at 111a.

C. The Legislative History of IGRA Supports the Conclusion that Congress Intended Indian Gaming Operations to Be Treated the Same as States for Purposes of Chapter 35 of the Code.

The passage of Indian gaming legislation was a long and arduous process. It took over a dozen bills in three Congresses before the enactment of IGRA in October 1988. IGRA Report at 3-6. Not surprisingly, the vast majority of the extensive legislative history focused on whether Indian gaming should be allowed, which games should be allowed, and under which government's regulation. *See, e.g., id.* The emphasis was not on taxation, nor on many other issues that have since led to litigation. What evidence there is, however, *supports* the Federal Circuit's holding in *Little Six* that Congress intended to place Indian gaming operations on the same footing as state gaming operations for purposes of Chapter 35 of the Code.

The first Indian gaming measure to be reported out of any committee of Congress was H.R. 1920 in 1986, and it was also the first to include any significant provision related to taxation. Section 4 of that bill, as passed by the full House of Representatives in April 1986, provided:

> Provisions of the Internal Revenue Code of 1954, as amended, concerning the taxation and the reporting and withholding of taxes pursuant to the operation of a gambling or wagering operation shall apply to the operations in accord with the Indian Gaming Regulatory Act the same as they apply to State operations.

H.R. 1920, § 4, 99th Cong., 2d Sess. (Apr. 21, 1986). From this statutory section, it is clear that the House did not intend that any "taxation" relating to gaming be imposed on tribes if it would not also be imposed on a state operating the same game. The House report accompanying H.R. 1920 specifically equated the reference to "taxation" with Chapter 35:

> Section 4 provides that relevant provisions of the Internal Revenue Code, such as section 3402(q) *and chapter 35*, 26 U.S.C., *concerning taxation* and the reporting and withholding of taxes relating to the operation of gaming activities shall apply to tribal gaming activities as they apply to State operated gaming activities.

H.R. Rep. No. 488, 99th Cong., 2d Sess. 12 (1986) ("House Report") (emphasis added).

In the next Congress, two bills in the Senate received the most attention: S. 555 (which became IGRA) and S. 1303, both of which included sections incorporating the taxation language from H.R. 1920 almost verbatim. Section 20(d) of S. 555 originally read:

> Provisions of the Internal Revenue Code of 1986, concerning the taxation and the reporting and withholding of taxes with respect to gambling or wagering operations shall apply to Indian gaming operations conducted pursuant to this Act the same as they apply to State operations.

S. 555, § 20(d), 100th Cong., 1st Sess. (Feb. 19, 1987); *see also* S. 1303, § 4(c), 100th Cong., 1st Sess. (June 2, 1987) (containing similar language). A joint hearing was held on the two bills, encompassing hundreds of pages of oral and written testimony. IGRA Hearings, *supra*. Those hearings support the view that Congress's only concern regarding federal revenue was that Indian tribes be asked to contribute to the cost of the regulation of Indian gaming, which was ultimately accomplished in Section 2717 of IGRA. *See, e.g., id.* at 98, 113-15, 285, 478. Except as discussed

below, there is no relevant substantive discussion of the tax provisions in the two bills and certainly no indication that Congress believed that tribes were or should be subject to federal wagering taxes.[12]

When S. 555 was reported out of the Senate Select Committee on Indian Affairs on August 3, 1988, the parenthetical specifically referencing Chapter 35 had been added to Section 2719(d) and the reference to "the taxation and the reporting and withholding of taxes" had been replaced with the more elaborate, inconsistent "winnings" language.

None of the hearings or other legislative history explains the reasons for the drafting changes, but the inclusion of the parenthetical is subject to only one reasonable interpretation. Rather than using the general concept of "taxation," it must have seemed important to the Committee to specify the tax statutes to which Section 2719(d) would apply. The specific reference to Chapter 35 must have been the outgrowth of a desire, adopted by the Committee and eventually by both houses of Congress, to ensure that Indian gaming operations, like the states, would not be subject to the wagering taxes which Chapter 35 otherwise imposes. As discussed above, the reference to Chapter 35 would make no sense if Indian gaming operations were not intended to be subject to the exemption for the states in Section 4402(3) of Chapter 35. Indeed, the reference to Chapter 35 in Section 2719(d) reflected a consistent intention, dating back to H.R. 1920, the earliest version of the provision considered in Congress, that the tribes would share the states' exemption from the Chapter 35 taxes. *See* House Report at 12 (equating original "taxation" language and "chapter 35").

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12. As discussed above, the first time that anyone, anywhere, ever suggested that the Chapter 35 taxes applied to tribes was in 1991, when two IRS examining agents proposed to apply these taxes in contemporaneous audits of the Community and another Indian tribe.

The introduction of the reference to "winnings" is also readily understandable. Congress was concerned that *tribal* tax exemptions should not also allow the *players* at tribal gaming halls to escape taxes on their winnings. *See* IGRA Hearings at 121-22. Congress wanted to ensure that the IRS would be able to track those players who won significant amounts of money at tribal bingo halls and casinos.

The deletion of the blanket word "taxation" must be understood in the context of the above changes. The deletion of "taxation" appears to be related to the replacement of the broad phrase "reporting and withholding of taxes with respect to gambling or wagering operations" with the narrower phrase "reporting and withholding of taxes with respect to the winnings from gaming or wagering operations." The statute's drafters appear to have been concerned about including blanket references to "taxation" and to "reporting . . . of taxes" for fear that these phrases would be read too broadly and misunderstood by tribal communities or others as suggesting a congressional intention to *impose* federal taxes on tribal governments through Section 2719(d). Indeed, the only relevant substantive discussion of the tax provisions in the hearings reveals this misunderstanding by tribal witnesses:

> Language on the applicability of the Internal Revenue Code [in S. 1303] is unacceptable because it appears to create IRS authority to tax tribes. The intent is unclear. Too vague to be useful. Distinguish between taxation and the withholding of taxes.
>
> * * *
>
> It should be clearly stated [in Section 20 of S. 555] that the Internal Revenue Service is not being granted authority to tax tribes.

IGRA Hearings at 433, 435 (written statement of Charles W. Blackwell, American Indian Tribal Government and Policy Consultants, Inc.). Similarly:

> We're opposed to any indication where Internal Revenue would be collecting taxes from the tribal bingo operations.
>
> * * *
>
> There are a number of treaties in the past history which state that Indian tribal governments will not be taxed, and we wish that those be recognized and upheld. That's a major concern of our[s], and we would hope that you[r] committee would take appropriate action on our behalf.

Id. at 109 (testimony of Lionel John, Executive Director of United South and Eastern Tribes).

By eliminating the word "taxation" and instead specifically referring to Chapter 35, Congress could alleviate tribal concerns that Section 2719(d) would be misconstrued to impose federal taxes on tribes and still provide Indian gaming operations with the same exemption from wagering taxes enjoyed by the states. Indeed, in enacting IGRA and its Section 2719(d), Congress rejected proposals in competing Indian gaming legislation to impose the Chapter 35 taxes on tribes.[13] While we may in retrospect wish Congress

13. H.R. 3605, introduced by Nevada Representatives Vucanovich and Bilbray, proposed to amend Section 7871 of the Code to provide that "[a]ny form of gaming activity on Indian lands . . . will be subject to the requirements of chapter 35 . . . of the Code." H.R. 3605, § 10(2), 100th Cong., 1st Sess. (Nov. 3, 1987). S. 1841, introduced by Nevada Senators Hecht and Reid, included an identical proposal. S. 1841, § 10(2), 100th Cong., 1st Sess. (Nov. 4, 1987). These bills were not reported out of committee, because Congress chose instead to enact IGRA. *See* IGRA Report at 4-5 (noting these bills and other competing legislative proposals).

had chosen more artful language in Section 2719(d), this is nevertheless the most reasonable explanation for how the ambiguity in that provision arose.[14]

In summary, the language of Section 2719(d), IGRA's overall statutory scheme and purpose, and the legislative history all support the Federal Circuit's construction of Section 2719(d) to treat the tribes and states equally for purposes of Chapter 35 of the Code. Thus, even without the important Indian canon of construction, the Nations should prevail in this case. Of course, to the extent that there is any doubt regarding the appropriate construction of Section 2719(d), then the Indian canon, faithfully applied by this Court for nearly 200 years, requires that such doubt be resolved in favor of the Federal Circuit's reasonable construction benefiting the tribes, as ably demonstrated in the brief of the Nations.

14. In *Little Six*, the United States attempted to find significance in the fact that the Senate committee report said nothing about Chapter 35 in the section-by-section analysis of IGRA, U.S. Fed. Cir. Brief pp. 24-25, but Congress itself, and not merely a committee thereof, expressly referred to Chapter 35 in the text of Section 2719(d). Moreover, this was consistent with its equation of "Chapter 35" and "taxation" in the section-by-section analysis of the earlier version of the bill passed by the House. That the Senate report focused on the fact that *players* of tribal games would be subject to income tax does not detract in any way from the statute's reference to Chapter 35. To the contrary, whereas some very affirmative indication that Congress intended its reference to Chapter 35 to have no force or effect would be necessary to read the reference out of the statute, the silence in the legislative history suggests that the statute's explicit incorporation of the Chapter 35 reference was uncontroversial.

CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the Tenth Circuit should be reversed.

Respectfully submitted,

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No. 00-507

In The

Supreme Court of the United States

THE CHICKASAW NATION AND
THE CHOCTAW NATION OF OKLAHOMA,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

AMICUS CURIAE BRIEF OF THE SAN MANUEL BAND OF SERRANO MISSION INDIANS IN SUPPORT OF PETITIONERS

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I. Interests of Amicus Curiae

The amicus curiae San Manuel Band of Serrano Mission Indians (hereinafter "San Manuel Band" or "Band") files this brief in support of petitioners Chickasaw Nation and Choctaw Nation of Oklahoma pursuant to the parties' consent.[1]

The San Manuel Band is a federally recognized Indian Tribe located in southern California. *See* 65 Fed. Reg. 13298, 13301 (March 13, 2000) (listing federally recognized Tribes). The Band has historically lacked the ability to raise governmental revenues through taxation and other means typically used by the United States and the several states to fund necessary governmental programs including health, education, housing, roads, and water projects. It is only through the development of a governmental gaming project pursuant to the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-21 (hereinafter "IGRA"), that the Band has been able to effectively exercise its sovereignty by raising revenue to create and implement vital governmental programs to improve its members' lives.

For these reasons, the Band has a substantial interest in supporting the petitioners in urging the Court to reverse the decision below.

II. Summary of Argument

The federal wagering excise and employment taxes at issue in this case only apply to lotteries "conducted for profit." For profit activities under the Internal Revenue Code

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[1] Copies of the parties' written consents are filed herewith. S.Ct. R. 37(3)(a). As required by Supreme Court Rule 37(6), counsel for the San Manuel Band note that they have authored this brief in whole, and that no other person or entity contributed monetarily to the preparation or submission of this brief.

are those for which income tax deductions are allowable. Indian tribal governments are not taxable entities for purposes of federal income tax. Because tribes are not taxable, they are not allowed deductions, and thus their activities are not for profit within the Internal Revenue Code's meaning. Because tribal governmental gaming is not "conducted for profit," it is not subject to the taxes at issue here.

This interpretation of the Internal Revenue Code harmonizes the IGRA(s) plain language, purposes and legislative history. It also promotes federal Indian policy and the unique trust relationship between the United States and Indian tribes. It is consistent with general principles of sovereignty. Finally, it also reflects an appropriate deference to Congress.

For these reasons, the amicus curiae San Manuel Band of Serrano Mission Indians respectfully requests that the Court reverse the judgment of the United States Court of Appeals for the Tenth Circuit.

III. Argument

A. The Taxes At Issue Here Only Apply to Lotteries "Conducted for Profit"

The excise tax at issue in this case applies to "any wager authorized under the law of the State in which [it is] accepted ...." 26 U.S.C. § 4401(a)(1). The related occupational tax at issue applies to persons subject to the wagering excise tax of section 4401, or to those who receive "wagers" on behalf of such a person. *See* 26 U.S.C. § 4411. A "wager" is "any wager placed in a lottery conducted for profit." 26 U.S.C. § 4421(1)(C).

A threshold question, therefore, is whether the petitioner tribes conduct a lottery "for profit." *Id.* For if a

tribal government's gaming activity is not "conducted for profit," 26 U.S.C. § 4421(1)(C), then it is not a "wager" and is not subject to the excise and occupational taxes at issue here.

B. "For Profit" Activities Are Those For Which Income Tax Deductions Are Allowable

The "starting point" of all statutory interpretation is "the plain language of the statute itself." *Rosewell v. LaSalle Nat. Bank*, 450 U.S. 503, 512 (1981) (*citing Reiter v. Sonotone Corp.*, 442 U.S. 330, 337 (1979)). Chapter 35 of the Internal Revenue Code (hereinafter "Code" or "IRC"), governing "Taxes on Wagering," does not define the term "profit." *See* 26 U.S.C. § 4411 ("definitions"). Nor do the Code's general definitions define the term "profit." *See* 26 USCA § 7701.

We are aided, however, by "the normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning." *Sullivan v. Stroop*, 496 U.S. 478, 484 (1990) (*quoting Sorenson v. Secretary of Treasury*, 475 U.S. 851, 860 (1986); *Helvering v. Stockholms Enskilda Bank*, 293 U.S. 84, 87 (1934); *Atlantic Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 433 (1932)) (internal quotations omitted).

Thus we may turn to the Code's only guidance on this question, which is found in section 26 USCA § 183 (c), defining "activity not engaged in for profit." *Id.* Section 183(c) provides that "[f]or purposes of this section, the term 'activity not engaged in for profit' means any activity other than one with respect to which deductions are allowable for the taxable year under section 162 or under paragraph (1) or (2) of section 212." *Id.* Section 162, in turn, provides in relevant part that "[t]here shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business ...." 26

U.S.C. § 162(a). Similarly, section 212 allows "as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year – (1) for the production or collection of income; [or] (2) for the management, conservation, or maintenance of property held for the production of income ...." 26 U.S.C. § 212(1)-(2).

To summarize, "activities not engaged in for profit," are "any activity other than one with respect to which" income tax deductions are allowable. *Id.* at § 183(c).

This conclusion is consistent with generally-accepted definitions of the term "profit." For example, Black's Law Dictionary defines "profit" as "most commonly, the gross proceeds of a business transaction less the costs of the transactions." Black's Law Dictionary 1090 (5th ed. 1979). Governmental actions aimed at raising revenue to fund governmental programs, by contrast, are not commonly thought of or referred to as "business transactions." *Id.*

C. Indian Tribal Governments Are Not Taxable Entities For Purposes of Federal Income Tax

As the leading authority on federal Indian law notes, "Indian tribes are not taxable entities under the income tax provisions of the Internal Revenue Code." F. Cohen, *Handbook of Federal Indian Law*, 390 (1982 ed.) (hereinafter "Cohen") (*citing* I.R.S. Rev. Rul. 67-284, 1967-2 C.B. 55, 58; Memo. Sol. Int., May 1, 1941, *reprinted in* 1 OPINIONS OF THE SOLICITOR OF THE DEPARTMENT OF THE INTERIOR RELATING TO INDIAN AFFAIRS 1917-1974, at 1044 (Washington: Government Printing Office, n.d.).[2]

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[2] This Court has consistently relied on Cohen's expertise in the area of federal Indian law since the work's initial publication in 1942. *See, e.g., Babbitt v. Youpee*, 519 U.S. 234, 237 (1997); *Hagen v. Utah*, 510 U.S. 399, 402 (1994); *Oklahoma Tax Com'n v. Sac and Fox Nation*, 508 U.S. 114, 124 (1993); *South Dakota v. Bourland*, 508 U.S. 679, 698 (1993);

The Internal Revenue Service first held more than three decades ago that "the political entity embodied in the concept of an Indian tribe has been recognized and no tax liability has been asserted against a tribe with respect to tribal income from activities carried on within the boundaries of the reservation." Rev. Rul. 67-284.[3] Unlike shareholders in a

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County of Yakima v. Confederated Tribes and Bands of Yakima Indian Nation, 502 U.S. 251, 254 (1992); *Blatchford v. Native Village of Noatak and Circle Village*, 501 U.S. 775, 793 (1991); *Duro v. Reina*, 495 U.S. 676, 689 (1990); *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 43 n. 16 (1989); *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989); *Brendale v. Confederated Tribes and Bands of Yakima Indian Nation*, 492 U.S. 408, 435 (1989); *South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498, 520 (1986); *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering*, 476 U.S. 877, 885 (1986); *Oneida County, N.Y. v. Oneida Indian Nation of New York State*, 470 U.S. 226, 247 (1985); *Solem v. Bartlett*, 465 U.S. 463, 466 n. 6 (1984); *Arizona v. California*, 460 U.S. 605, 651 (1983); *Rice v. Rehner*, 463 U.S. 713, 718 (1983); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 139 (1982); *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 165 n. 1 (1980); *Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 657 n.1 (1979); *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 199 n. 9 (1978); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55 (1978); *Delaware Tribal Business Committee v. Weeks*, 430 U.S. 73, 86 (1977); *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 159 (1973); *Federal Power Com'n v. Tuscarora Indian Nation*, 362 U.S. 99, 133 n. 12 (1960); *Williams v. Lee*, 358 U.S. 217, 219 (1959); *Creek Nation v. United States*, 318 U.S. 629, 639 (1943); *Sioux Tribe of Indians v. United States*, 316 U.S. 317, 325 n. 5 (1942).

[3] Though the on-reservation location of tribal activity no longer is relevant, *see* Rev. Rul. 94-16 ("income earned by an unincorporated tribe, regardless of the location of the business activities that produced the income, is not subject to federal income tax"), tribal governmental gaming must take place on reservation (or equivalent) lands. *See* Indian Gaming Regulatory Act, 25 U.S.C. § 2710(d)(1) (class III gaming activities lawful only on "Indian lands"); *id.* at § 2710(a)(2) (class II gaming lawful only on "Indian lands"); *id.* at § 2703(4) ("Indian lands" defined as "all lands within the limits of any Indian reservation" or, similarly, other federal trust lands over which the tribe exercises governmental power).

corporation, "[t]he assets of an Indian tribe are owned by the tribe as a community and not by the members either as individuals or as tenants in common. The right to participate in the enjoyment of tribal property depends on continuing membership in the Indian tribe." *Id.* (*citing Gritts v. Fisher*, 224 U.S. 640, 642 (1912)).

Subsequent IRS rulings over the ensuing decades have reaffirmed this position. "Neither an unincorporated Indian tribe nor a corporation organized under section 17 of the Indian Reorganization Act of 1934 is subject to federal income tax on its income, regardless of the location of the activities that produced the income." Rev. Rul. 94-16. The IRS explained in unequivocal terms that "[b]ecause an Indian tribe is not a taxable entity, any income earned by an unincorporated tribe, regardless of the location of the business activities that produced the income, is not subject to federal income tax." *Id.*[4]

"[T]ribes have been consistently treated by the Internal Revenue Service as other than taxable entities under every income tax statute." Cohen, at 390 n. 8. The Code taxes the income of every "individual," "estate and trust" and "corporation." *See* 26 U.S.C. §§ 1, 1(e), 11. *See also* Cohen at 390. The Code does not, however, tax Indian tribal governments, which are "unique aggregations," *United States v. Mazurie*, 419 U.S. 544, 557 (1975), "like no other legal entities." Cohen at 390.

[4] This Court has deferred to positions reflected in a longstanding series of Revenue Rulings consistently adhering to the same position in a variety of fact patterns. *See, e.g., National Muffler Dealers Assn., Inc. v. United States*, 440 U.S. 472, 483-484, and nn. 16-19 (1979).

D. Because Tribes Are Not Taxable, They Are Not Allowed Deductions, and Thus Their Activities Are Not For Profit, Within the Code's Meaning

Because tribal governments are not taxable entities subject to federal income taxation, they are necessarily not allowed any deductions for their expenses incurred in operating governmental gaming enterprises. If an "activity is not engaged in for profit, no deduction attributable to such activity shall be allowable ...." 26 U.S.C. § 183(a). The regulations similarly provide that "[n]o deductions are allowable for expenses incurred in connection with activities which are not engaged in for profit." 26 C.F.R. § 1.183-2. Deductions are only allowable -- indeed only make sense -- in the context of taxable income. Section 63 of the Code generally defines "taxable income" as "gross income minus the deductions allowed by this chapter." 26 U.S.C. § 63. Since tribal governments have no taxable income, they necessarily have no gross income and no "deductions," within the Code's meaning. *Id.*

Thus tribal governmental gaming activities are "other than one[s] with respect to which deductions are allowable," and they are therefore defined as "activities not engaged in for profit," within the Code's meaning. 26 U.S.C. § 183(c). The Tenth Circuit's decision ignores entirely the question of whether tribal government gaming is "conducted for profit." 26 U.S.C. 4421(1)(c).

This interpretation of the Code resolves the ambiguity that otherwise exists in 25 U.S.C. § 2719(d)(1). *See Little Six, Inc,. v. United States*, 210 F.3d 1361, 1365 (Fed. Cir. 2000) ("§ 2719(d)(1) is ambiguous"); *Little Six, Inc. and Shakopee Mdewakanton Sioux (Dakota) Community v. U.S.*, No. 99-5083 (Dyk, J., dissenting from denial of rehearing en banc) ("there is no way to reconcile § 2719(d)'s literal [language regarding reporting and withholding of taxes] with its parenthetical reference to Chapter 35"); *Chickasaw Nation*

v. U.S., 208 F.3d 871, 883 (10th Cir. 2000) ("§ 2719(d)'s reference to Chapter 35 is somewhat cryptic").

Since tribal government gaming is not "conducted for a profit," 26 U.S.C. § 4421(1)(c), IGRA's language regarding "reporting and withholding of taxes" may be given its full effect. 25 U.S.C. § 2719(d)(1). Similarly, IGRA's parenthetical language referencing Chapter 35 also makes sense, particularly given that it does arguably contain provisions that relate to reporting and withholding information, the Tenth Circuit's contrary view notwithstanding. *See* 26 U.S.C. § 4424 ("Disclosure of wagering tax information").

E. This Interpretation of the Code Harmonizes IGRA's Purposes and Legislative History, Promotes Federal Indian Policy and the Trust Relationship, Is Consistent With General Principles of Sovereignty, and Reflects An Appropriate Deference To Congress

In addition to reflecting the plain language of the tax Code sections at issue, this analysis has much to recommend it. First, it harmonizes IGRA's purposes and legislative history. Second, it promotes federal Indian policy and the unique trust relationship between the United States and Indian tribal governments. Third, it is consistent with general principles of sovereignty. Finally, it reflects an appropriate deference to Congress. Each of these matters are addressed in turn.

1. This Interpretation of the Code Furthers IGRA's Purposes

In enacting IGRA, Congress found that "a principal goal of Federal Indian policy is to promote tribal economic development, tribal self-sufficiency, and strong tribal government." 25 U.S.C. § 2701(4). IGRA's primary

purpose was to "provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments." 25 U.S.C. § 2702(1).

Thus Congress' findings and purposes in authorizing tribal gaming enterprises explicitly and clearly furthered federal Indian policies based on the governmental, sovereign aspect of tribal governments.

In aid of its policy of strengthening tribal governments, Congress strictly limited the uses to which tribes could put dollars generated through gaming enterprises:

> [N]et revenues from any tribal gaming are not to be used for purposes other than – (i) to fund tribal governmental operations or programs; (ii) to provide for the general welfare of the Indian tribe and its members; (iii) to promote tribal economic development; (iv) to donate to charitable organizations; or (v) to help fund operations of local government agencies.

25 U.S.C. § 2710(b)(2)(A). Thus unlike the profits of a business, which can be put to any lawful use the owners desire, revenues from tribal governmental gaming enterprises may only be utilized in furtherance of Congress' policies.

The interpretation of the tax Code set forth above at sections III(A)-(D) of this brief would maximize tribal governments' realization of revenues from gaming activities under IGRA. That result directly supports Congress' primary goal of "promoting tribal economic development, self-sufficiency, and strong tribal governments." 25 U.S.C. § 2702(1).

The Tenth Circuit's decision, on the other hand, would generate substantial governmental revenue for the United States. That was not, however, an express goal of Congress in enacting IGRA.

Congress' secondary purposes in enacting IGRA included providing a "statutory basis for the regulation of gaming by an Indian tribe adequate to shield it from organized crime and other corrupting influences," to ensure the tribe is the "primary beneficiary" of the activity, and to assure that gaming is conducted fairly. 25 U.S.C. § 2702(3). By affirmatively requiring tribes to comply with the Code's reporting and withholding requirements, Congress furthered these secondary policies. *See* 25 U.S.C. § 2719(d)(1).

In sum, by expressly requiring tribes to report and withhold taxes on winnings, but not expressly taxing tribal governments, Congress was furthering its policy goals articulated in IGRA at 25 U.S.C. § 2702. By contrast, the Tenth Circuit's decision below does not further any identifiable congressional policy embodied in IGRA.

2. This Interpretation of the Code Harmonizes IGRA's Legislative History

Both the Tenth Circuit opinion and the Brief for the United States, previously filed herein, argue that an earlier version of the bill that became IGRA included a tax exemption for tribal gaming that was deleted before its passage. *See Chickasaw Nation v. United States*, 208 F.3d 871, 882-83 (10th Cir. 2000) (*citing Little Six, Inc. v. United States*, 43 Fed. Cl. 80, 83 (Fed.Cl.1999)). *See also* Brief for the United States, Chickasaw Nation v. United States, No. 00-507, at 8 (filed Dec. 22, 2000). From this the United States asserts that "Congress explicitly declined" to exempt tribal governments from wagering excise taxes. *Id.*

This argument ignores the fact that under existing law, no such exemption needed to be included in IGRA. As outlined above, because tribal government gaming is not "conducted for profit," it does not involve "wagers," within the meaning of Chapter 35 of the Code. 26 U.S.C. § 4421(1)(C). As such, the language the United States points to was deleted as surplusage. No other motive for the deletion appears in IGRA or its legislative history.

As between two alternative interpretations of IGRA's legislative history explaining the deletion of the word "taxation" from what would become 25 U.S.C. § 2719, the United States' view undermines IGRA's express purposes. The interpretation suggested in this brief, on the other hand, furthers those same policies.

3. This Interpretation of the Code Promotes Federal Indian Policy and the Unique Trust Relationship

Since the termination era's end,[5] Congress has consistently voiced its strong support for tribal self-determination and economic self-sufficiency. These policies are embodied in a variety of federal statutes including the Indian Financing Act of 1974, 25 U.S.C. §§ 1451, *et seq.*, the

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[5] The 1960s marked a sea change in federal Indian policy. President Johnson's "Special Message to the Congress on the Problems of the American Indian: 'The Forgotten American,'" proposed "a new goal for our Indian programs: A goal that ends the old debate about 'termination' of Indian programs and stresses self-determination; a goal that erases old attitudes of paternalism and promotes partnership and self-help." 1968-69 Pub. Papers, pt. I, at 335-36 (Lyndon B. Johnson). President Nixon's 1970 statement on Indian affairs solidified the direction of modern federal Indian policy. *See* 116 Cong. Rec. 23258. President Nixon noted the termination policy's failure, stressed the continuing importance of the trust relationship between the federal government and tribes, and advocated a legislative program to support tribal governments in managing their own affairs and strengthening their autonomy. *See id.*

Indian Self-Determination and Education Assistance Act , 25 U.S.C. §§ 450, *et seq*., and most relevant to the case at bar, the Indian Gaming Regulatory Act of 1988, 25 U.S.C. §§ 2701, *et seq*.

The Indian Self-Determination Act "committed" the United States "to supporting and assisting Indian tribes in the development of strong and stable tribal governments, capable of administering quality programs and developing the economies of their respective communities." 25 U.S.C. § 450a(b). As noted above, these are fundamentally the same policies embodied in IGRA. Recognizing that tribal government gaming is not "conducted for profit," 26 U.S.C. § 4421(1)(C), and thus not subject to the wagering excise tax and related employment tax, will "promot[e] tribal economic development, self-sufficiency, and strong tribal government." 25 U.S.C. § 2702(1). By contrast, the Tenth Circuit's decision, if allowed to stand, will strengthen the federal government's "economic self-sufficiency," but weaken tribal governments.

Along with these important and settled federal Indian policies, this Court has also long recognized "the undisputed existence of a general trust relationship between the United States and the Indian people." *U.S. v. Mitchell*, 463 U.S. 206, 225 (1983). *See Seminole Nation v. United States*, 316 U.S. 286, 296 (1942). For close to two centuries "[t]his principle has long dominated the Government's dealings with Indians." *Mitchell*, 463 U.S. at 225.[6] This Court's decisions require the United States' trust obligations to Indian tribes be exercised

[6] *See, e.g., United States v. Mason*, 412 U.S. 391, 398 (1973); *Minnesota v. United States*, 305 U.S. 382, 386 (1939); *United States v. Shoshone Tribe*, 304 U.S. 111, 117-118 (1938); *United States v. Candelaria*, 271 U.S. 432, 442 (1926); *McKay v. Kalyton*, 204 U.S. 458, 469 (1907); *Minnesota v. Hitchcock*,185 U.S. 373, 396 (1902); *United States v. Kagama*, 118 U.S. 375, 382-384 (1886); *Cherokee Nation v. Georgia*, 5 Pet. 1, 17, 8 L.Ed. 25 (1831)).

according to the strictest fiduciary standards. *See United States v. Mason*, 412 U.S. 391, 398 (1973); *Seminole Nation v. United States*, 316 U.S. 286, 296-97 (1942). The trust obligation extends to all federal actions. *See Seminole Nation*, 316 U.S. at 297.

To read IGRA and the Code as taxing the beneficiary for the trustee's benefit, as the Tenth Circuit's opinion does, would be "an act of confiscation," of tribal sovereignty, *Lane v. Pueblo of Santa Rosa*, 249 U.S. 110, 219, 229 (1919), and would be inconsistent with the federal government's trust and fiduciary duties to tribes. Given that "'the power to tax involves the power to destroy,'" we should not be quick to assume Congress intended to tax tribes for the United States' benefit. *Atherton v. F.D.I.C.*, 519 U.S. 213, 221 (1997) (*quoting McCulloch v. Maryland*, 4 Wheat. 316, 431, 4 L.Ed. 579 (1819))

4. This Interpretation of the Code Is Consistent With General Principles of Sovereignty

This Court has historically required Congress to use express and unequivocal language when diminishing sovereign rights of Indian tribal governments.

For example, in *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226 (1985), this Court held that "'[a]bsent explicit statutory language,' this Court accordingly has refused to find that Congress has abrogated Indian treaty rights." *Id.* at 247 (*quoting Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 668, 690 (1979)). "The Court has applied similar canons of construction in nontreaty matters." *Oneida County*, 470 U.S. at 247. The Court "has held that congressional intent to extinguish Indian title must be plain and unambiguous," *United States v. Santa Fe Pacific R.R. Co.*, 314 U.S. 339, 346 (1941), and will not be "lightly implied." *Id.* at 354.

Relying on the strong policy of the United States "from the beginning to respect the Indian right of occupancy," *id.*, at 345 (*citing Cramer v. United States*, 261 U.S. 219, 227 (1923)), the Court concluded that it "[c]ertainly" would require "plain and unambiguous action to deprive the [Indians] of the benefits of that policy." 314 U.S. at 346. *See Oneida County*, 470 U.S. at 247-48. Similarly, in *Solem v. Bartlett*, 465 U.S. 463 (1984), this Court held that Congress must "clearly evince" an intent to diminish reservation boundaries. *Id.* at 470.

In the sovereign immunity context, this Court has consistently held that congressional abrogation of tribal sovereign immunity must be clearly expressed. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978) ("It is settled that a waiver of sovereign immunity cannot be implied but must be unequivocally expressed") *Turner v. United States*, 248 U.S. 354 (1919). The same rule applies to attempted federal abrogations of the states' sovereign immunity: "Congress may abrogate the States constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute." *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, __ , 120 S.Ct. 631, 640 (2000) (*quoting Dellmuth v. Muth.*, 491 U.S. 223, 228 (1989); *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 (1985)) (internal quotations omitted). *See also Blatchford v. Native Village of Noatak and Circle Village*, 501 U.S. 775, 785 (1991) ("our cases require Congress' exercise of the power to abrogate state sovereign immunity, where it exists, to be exercised with unmistakable clarity").

The United States ignores this well-established doctrine regarding federal diminishment of sovereign rights of Indian tribes and states. Instead, it claims that "this Court does not require that Congress use explicit language to extend general federal tax statutes to Indians." Brief for the United States at 11-12. The government cites but one case in

support of its claim: *Superintendent of Five Civilized Tribes v. Commissioner of Internal Revenue*, 295 U.S. 418, 419-20 (1935). The United States fails to note, however, that the sole case it relies on involved federal taxation of an individual Indian person, not a tribal government. Given that it is tribal governments, not individual Indians, that possess sovereignty,[7] the United States' argument on this point is entirely unsupported.

Congress has not expressed an intent to subject tribal governmental gaming to the wagering excise tax and related occupational tax with a clarity that approaches the "nature of mathematical certainty." *Black's Law Dictionary*, 1370 (5th ed. 1979) (defining "unequivocal").

5. This Interpretation of the Code Properly Defers to Congress

Congress has defined "not for profit" in a way that excludes tribal governmental activity. 26 U.S.C. § 4421(1)(C). Given the strong federal policies supporting tribal governments and tribal economic development, and in light of the unique federal trust relationship with tribes, the federal courts should exercise a significant degree of deference to Congress before holding tribal governments subject to federal taxation.

In *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751 (1998), this Court noted that, while it has taken a leading role in "drawing the bounds of tribal immunity, Congress, subject to constitutional

---

[7] "Indian tribes have been recognized, first by the European nations, later by the United States, 'as distinct, independent political communities' qualified to exercise powers of self-government, not by virtue of any delegation of powers, but rather by reason of their original tribal sovereignty." Cohen at 232 (*quoting Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 519, 8 L.Ed. 483 (1832)) (hereinafter "Cohen").

limitations, can alter its limits through explicit legislation." *Id.* at 759. This deference acknowledged that "Congress is in a position to weigh and accommodate the competing policy concerns and reliance interests." *Id.* Congress' ability "to address the issue by comprehensive legislation counsels some caution by us in this area." *Id.* Because Congress has "'occasionally authorized limited classes of suits against Indian tribes' and 'has always been at liberty to dispense with … or to limit,'" tribal immunity, the fact that Congress "has not yet done so" continues to warrant judicial deference. *Id.* (*quoting Potawatomi*, 498 U.S. at 510).

Congress knows how to expressly subject tribes to federal regulation that impinges on tribal sovereign authority when it so chooses. *See, e.g.*, 25 U.S.C. § 450e-2 (tribal use of "excess funds" under self-determination contracts "shall be determined by the appropriate Secretary"); 25 U.S.C. § 695 (mandatory procedures for termination of federal supervision of tribal property of western Oregon Indians); *Santa Clara Pueblo*, 436 U.S. at 58 "discussing the Indian Civil Rights Act's abrogation of tribal sovereign immunity from habeas corpus actions". It has not done so with regard to wagering excise tax or the related employment tax at issue here.

IV. Conclusion

For these reasons, the amicus curiae San Manuel Band of Serrano Mission Indians respectfully requests that the Court reverse the judgment of the United States Court of Appeals for the Tenth Circuit.

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IN THE

Supreme Court of the United States

THE CHICKASAW NATION AND
THE CHOCTAW NATION OF OKLAHOMA,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF *AMICI CURIAE* SEMINOLE TRIBE OF FLORIDA, LAC COURTE OREILLES BAND OF LAKE SUPERIOR CHIPPEWA, AND SAINT REGIS MOHAWK TRIBE IN SUPPORT OF THE PETITIONERS

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INTEREST OF *AMICI CURIAE*

The Seminole Tribe of Florida is a federally recognized Indian tribe with nearly 3,000 members and five reservations located in the State of Florida.[1] The Tribe owns and operates five gaming facilities in Florida, located on its reservation lands in Hollywood, Brighton, Coconut Creek, Tampa and Immokalee. The Seminole Tribe sells paper pull-tabs at its gaming facilities and has paid the federal wagering excise and occupational taxes purportedly imposed by chapter 35 of the Internal Revenue Code for many years.

The Lac Courte Oreilles Band of Lake Superior Chippewa ("Lac Courte Oreilles Tribe") is a federally recognized tribe located in Northwest Wisconsin with approximately 5,700 members. The Lac Courte Oreilles Tribe operates a casino where paper pull-tabs are sold and pays the federal wagering taxes purportedly imposed by chapter 35 of the Internal Revenue Code.

The Saint Regis Mohawk Tribe is a federally recognized tribe located in the northern part of the State of New York with approximately 9,500 members. The Saint Regis Mohawk Tribe owns the Akwesasne Mohawk Casino and sells paper pull-tabs as part of its gaming activities. The Saint Regis Mohawk Tribe also pays the federal wagering taxes purportedly imposed by chapter 35 of the Internal Revenue Code.

The Court's decision in the instant case will determine whether the Seminole Tribe, the Lac Courte Oreilles Tribe and the Saint Regis Mohawk Tribe are required to pay the

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[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for any party to this dispute authored this brief in whole or in part and no person or entity, other than *amici curiae* and their members, made any monetary contribution to the preparation or submission of this brief. All parties have consented to the filing of this brief and letters of consent have been filed with the Office of the Clerk of this Court.

federal wagering taxes imposed by chapter 35 of the Internal Revenue Code, as well as whether they are entitled to refunds for amounts previously paid. Thus, all three tribes have a direct financial interest in the outcome of this case.

The Tribes disagree with the decision reached below by the Tenth Circuit Court of Appeals and believe that 25 U.S.C. § 2719 exempts tribes from the wagering taxes at issue. However, the textual analysis of 25 U.S.C. § 2719 that supports this position was not fully developed in the proceedings below. Thus, the Tribes respectfully submit this brief *amici curiae* to ensure that a full analysis of the statutory provision at issue is presented to this Court.

SUMMARY OF ARGUMENT

Indian tribes are not subject to federal excise tax on the sale of pull-tabs in their wagering operations. The Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2721; 18 U.S.C. §§ 1166-1168 (1988)("IGRA"), that authorized tribes to sell pull-tabs, simultaneously provided that tribes conducting such activities should be treated as states—that is, they must withhold taxes from winners and are exempt from federal excise taxation on their wagering operations.

The grammatical structure of the statutory provisions requires a statutory reading that tribes are exempt from the taxes in question. Further, the taxes do not, by the terms of the taxing statute, apply to federally authorized wagering operations. The IGRA does not impose any new tax. It must follow that tribal wagering operations are outside the scope of the subject federal excise taxation.

ARGUMENT

Introduction

The Indian Gaming Regulatory Act, 25 U.S.C. § 2701-2721; 18 U.S.C. §§ 1166-1168 (1988)("IGRA"), includes a provision to exempt Indian tribes, like states, from the federal excise taxes on wagering imposed by 26 U.S.C. §§ 4401 and 4411. The relevant provision (25 U.S.C. § 2719(d)(1)), states that Indian tribes are to be treated in the "same manner" as states for purposes of chapter 35 (which contains sections 4401 and 4411). Since states are expressly exempt from these taxes, Congress intended that Indian tribes enjoy a similar exemption.

Nevertheless, in the case below (and in direct conflict with a subsequent decision by the Court of Appeals for the Federal Circuit[2]), the Tenth Circuit Court of Appeals held that Congress intended that Indian tribes be treated as states only for purposes of "reporting and withholding of taxes" and not for purposes of the general exemption from the taxes imposed by chapter 35. As detailed below, the Tenth Circuit's construction of 25 U.S.C. § 2719(d)(1) violates the rules of statutory construction and the precedent of this Court. Finally, sections 4401 and 4411 are simply not otherwise applicable to Indian tribal gaming operations.

1. Section 20 of the Indian Gaming Regulatory Act Extends to Tribes the Same Exemption to Excise Taxes on Wagering Enjoyed by States.

Whether Congress intended Indian tribes to be subject to certain taxes (section 4401[3] and section 4411[4] of the Internal

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[2] *Little Six, Inc. v. United States*, 210 F.3d 1361, *reh'g denied*, 229 F.3d 1383 (Fed. Cir. 2000).

[3] Section 4401 imposes an excise tax of .25 percent on state-authorized wagers and 2.0 percent on wagers not authorized by state law.

[4] Section 4411 imposes an occupation tax of $50 per year on authorized persons who sell pull-tabs and $500 per year on unauthorized persons selling pull-tabs.

Revenue Code) on pull-tab[5] wagering operations turns on a parsing of a sentence in the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2721; 18 U.S.C. §§ 1166-1168 (1988)("IGRA"). Specifically relevant is 25 U.S.C. § 2719(d)(1):

> The provisions of the Internal Revenue Code of 1986 (including sections 1441, 3402(q), 6041, and 6050I, and chapter 35 of such Code) concerning the reporting and withholding of taxes with respect to the winnings from gaming or wagering operations shall apply to Indian gaming operations conducted pursuant to this chapter, or under a Tribal-State compact entered into under section 2710(d)(3) of this title that is in effect, *in the same manner as such provisions apply to State gaming and wagering operations.*

(Emphasis added.)

This provision expressly exempts Indian tribes from the excise taxes at issue. First, the designation of "chapter 35" in this subsection is not an isolated "parenthetical reference" without further effect, except to incorporate the definitions of the terms "wager" and "lottery," as posited by the Court of Appeals in *Chickasaw Nation v. United States*, 208 F.3d 871, 883 (10th Cir. 2000), and advocated by the Government (Resp't Br. on *Cert.*, p. 6). To the contrary, each of the parenthetically enumerated tax code provisions, including chapter 35, is reflected in a parallel counterpart in the portion of the sentence that follows. "[S]ections 1441, 3402(q), 6041, and 6050I" each contain provisions relating to reporting and withholding of taxes.[6] Chapter 35 relates to wagering and

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[5] The Government states that "[t]he term 'wager' includes any lottery that involves pull-tabs." Resp't Br. on *Cert.*, p. 2.

[6] With the exception of section 3406(q), all of the listed provisions have general applicability and gaming is only part of the covered subject. Section 1441 provides for withholding of tax on nonresident aliens; section 3406(q) provides for "Extension of withholding to certain

imposes two separate taxes. States are exempted.[7] 26 U.S.C. § 4402(3). As further explained below, the enumerated Internal Revenue Code provisions form two groups that are treated separately in the remaining portion of section 2719(d)(1).

In fact, the structure of the provision demonstrates that all of the listed Internal Revenue Code provisions are *not* treated with a single purpose. First, by twice using the conjunctive "and," the parenthetical phrase listing the Code provisions demarcates two components: "1441, 3402(q), 6041, *and* 6050I, [component A[8]] *and* chapter 35 [component B]."[9] 25 U.S.C. § 2719(d)(1)(emphasis added). If the purpose were to treat *all* of the listed provisions with a single purpose (that single purpose being, as the Government contends, that they are all referents for the phrase "concerning the reporting and withholding of taxes"), the first "and" would be superfluous.

Second, reinforcing the separate treatment of the two components is the wording of the phrase "concerning the reporting and withholding of taxes with respect to the winnings from gaming *or* wagering operations. . . ."[10]

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gambling winnings;" section 6041 covers "Information at source" and requires "a true and accurate return" covering payments of $600 or more; and section 6050I requires a return covering the receipt of $10,000 or more in a transaction.

[7] Chapter 35 concerns "Taxes on wagering." It imposes an excise tax on wagers and an "occupational tax" on receiving wagers.

[8] These provisions could have been made applicable to tribal operations without reference to the state.

[9] The exemptive treatment of the state under this provision obviously was the attribute of chapter 35 which Congress sought to extend to tribes.

[10] The Government's misquotation of the reference to chapter 35 as applicable to "gaming *and* wagering operations" is material to this analysis. (Resp't Br. on *Cert.*, p. 6 (emphasis added)). The correct language referring to chapter 35 is "gaming *or* wagering operations." 25 U.S.C. § 2719(d)(1) (emphasis added). The phrase "gaming *and*

25 U.S.C. § 2719(d)(1) (emphasis added). The term "winnings" applies to the winnings from gaming by patrons of the gaming enterprise. Tribes, as enterprise operators, are not the "winners" in the sense in which that term is used in the Internal Revenue Code; any winners are the patrons of the enterprises. The term "wagering *operations*" applies to the operator of the gambling enterprise—here, the tribe, not the patrons.

When the legislative sentence contains two separate units separated by the word "or," that word "or" is disjunctive.[11] The Government's assertion to the contrary is not supported by precedent.

This Court has held that the word "or" is disjunctive. *Reiter v. Sonotone Corp.*, 442 U.S. 330, 338 (1979), held that "or" was disjunctive as used in the relevant provision of the Clayton Act that allowed individuals to bring suit for injuries sustained in their "business *or* property." (Emphasis added.) A contrary interpretation "would have us ignore the disjunctive 'or' and rob the term 'property' of its independent and ordinary significance . . . ." *Id.* at 338-39.

The Court of Appeals for the Federal Circuit recently addressed the usage of the word "or" in *Van Wersch v. Department of Health and Human Services*, 197 F. 3d 1144 (Fed. Cir. 1999). The court in that case said:

wagering operations" appears later in the subsection referring to state activities.

[11] The disjunctive intent of "gaming or wagering" is further strengthened by the presence of "gaming *and* wagering" later in the same subsection. The reference to the states includes "gaming and wagering" together, extending equal treatment to tribes for both activities. The earlier phrase is intended to be treated differently, in that it refers to the two disparate functions: withholding from gaming [winnings] as distinct from taxation on wagering [operations].

> The plain meaning of "or" is disjunctive. See Webster's Third International Dictionary 1585 (1986) (stating that "or" is a "function to indicate . . . an alternative between different or unlike things, states, or actions").

Id. at 1148.

> To adopt the reading that the government urges would require us to ignore the meaning of the word "or" that the dictionary, common sense, and the experience of life all bring to us. There simply is no way around the fact, in the English language, the word "or" unambiguously signifies alternatives.

Id. at 1151.

The rule therefore mandates that the word "or" in section 2719(d)(1) be construed as a disjunctive in this manner:

> The provisions of the Internal Revenue Code . . . concerning
>
> [A] the reporting and withholding of taxes with respect to winnings from gaming [referring to the withholding and reporting provisions]
>
> *or*
>
> [B] wagering operations [referring to treatment of states in chapter 35] shall apply to Indian gaming operations . . . in the same manner as such provisions apply to state gaming and wagering operations.

(Emphasis added.) Only then can Congress' stated objective of the subsection—to treat tribes as states—be achieved.

In contrast, were the sentence read as the Government suggests, meaning would not be given to all of the words employed and, equally significant, the stated objective of the Congress would be ignored.[12] This Court has stated: "In

[12] Indeed, the Government in its brief (Resp't Br. on *Cert.*, p. 7.), quotes, with approval, the words of a dissenting judge in *Little Six, Inc. v. United States*, 229 F. 3d 1383, 1385 (Fed. Cir. 2000): "It is far easier to

construing a statute we are obliged to give effect, if possible, to every word Congress used." *Reiter*, 442 U.S. at 339 (internal citations omitted). Failing to construe "or" as disjunctive would be inconsistent with that obligation.

Pursuant to 26 U.S.C. § 7871, enacted as part of the Indian Tribal Governmental Tax Status Act (1982), tribes are treated as states, exempting them from federal taxation. Extending that exemption in IGRA to include gaming activities authorized by IGRA merely maintains the *status quo* with respect to taxing tribes. Congress may not, as the Government contends, tax its wards by implication. Congress must make that change only through express language. In *Bryan v. Itasca County*, 426 U.S. 373, 381 (1976), this Court found significance in the

> total absence of mention or discussion regarding a congressional intent to confer upon the States an authority to tax Indians or Indian property on reservations. Neither the Committee Reports nor the floor discussion in either House mentions such authority. This omission has significance in the application of the canons of construction applicable to statutes affecting Indian immunities, as *some mention would normally be expected if such a sweeping change in the status of tribal government and reservation Indians had been contemplated by Congress.*

(Emphasis added.) Although this case involves federal, rather than state taxation, the same rule applies—Congress may not impose this tax by inference.

If Congress, contrary to policy and history of treatment of tribes with respect to federal taxes, intended to make a drastic change and tax tribes, it could have so stated.

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make sense out of the statute if the inconsistent specific examples are read out of the statute because they conflict with the limitation."

2. The Excise Tax Provisions Are Not Applicable to Tribes.

Sections 4401 and 4411 do not impose taxes on Indian tribal gaming operations. The government is incorrect in its assertion to the contrary.

Liability under section 4411 is expressly tied to liability under section 4401.[13] Section 4401, with respect to authorized wagers, provides: "There shall be imposed on any wager *authorized under the law of the State in which accepted* an excise tax equal to 0.25 percent of the amount of such wager." 26 U.S.C. § 4401(a)(1) (emphasis added). However, tribal gaming operations are authorized by IGRA, and not under the law of the state in which accepted. Thus, section 4401(a)(1) is not applicable.

The tax imposed by section 4401(a)(2) is directed at unlawful wagers and impose taxes which are significantly higher than taxes on authorized wagers. *See United States v. Hallmark*, 911 F. 2d 399, 401 (10th Cir. 1990)("the tax rates [in section 4401] may reflect Congress' judgment relative to the different economic realities of legal and illegal wagering activities."). By authorizing tribes to conduct lawful wagering

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[13] Section 4411 provides:

> (a) In general. There shall be imposed a special tax of $500 per year to be paid *by each person who is liable for the tax imposed under section 4401* or who is engaged in receiving wagers for on behalf of any person so liable.
>
> (b) Authorized persons
>
> Subsection (a) shall be applied by substituting "$50" for "$500" in the case of—
>
> > (1) any person whose liability for tax under section 4401 is determined only under paragraph (1) of section 4401(a), and
> >
> > (2) any person who is engaged in receiving wagers only for or on behalf of persons described in paragraph (1).

26 U.S.C. § 4411 (emphasis added).

enterprises under federal law, Congress did not, in the same law, subject them to punitive excise taxes on unauthorized wagers under state law as though they were lawbreakers—as if they were illegally conducting wagering unauthorized under state law. Thus, section 4401(a)(2) (and consequently section 4411) is not applicable to Indian gaming.

This interpretation is consistent with the canon that laws imposing taxes are to be strictly construed. In *United States v. Merriam*, 263 U.S. 179, 187-188 (1923), this Court stated:

> in statutes levying taxes the literal meaning of the words employed is most important, for such statutes are not to be extended by implication beyond the clear import of the language used. If the words are doubtful, the doubt must be resolved against the Government in favor of the taxpayer.

(Internal citation omitted.) *See also Crooks v. Harrelson*, 282 U.S. 55, 61 (1930) ("the general rule requiring adherence to the letter applies with peculiar strictness [to taxing acts]."). Accordingly, sections 4401 and 4411, by their own terms, have no application to tribes.

The imposition of a tax is limited to the express provisions of the statute:

> In the interpretation of statutes levying taxes it is the established rule not to extend their provisions by implication, beyond the clear import of the language used, or to enlarge their operation so as to embrace matters not specifically pointed out.

Gould v. Gould, 245 U.S. 151, 153 (1917). The express provisions of sections 4401 and 4411 are not applicable to federally authorized tribal gaming activities.

If Congress had intended the tax-imposing provisions of section 4401 and section 4411 to apply to tribes, it could easily have amended the statute to provide that the taxes imposed by those provisions shall apply to any wager

"authorized under the Indian Gaming Regulatory Act." It did not do so.[14]

3. Tribal Tax Exemption is Accomplished by Existing Statutory Language.

The Tenth Circuit Court of Appeals (*Chickasaw, supra,* at 882-883) and the Government, (Resp't Br. on *Cert.*, p. 8), argue that any exemption was deleted from the bill prior to passage.[15] The Tenth Circuit Court held that the deletion of an express exemption barred a "negative inference" that would support an implied exemption. Likewise, the Government argues in its brief that "The deletion of the express exemption in the original proposal is strong evidence of Congress's intent not to provide such an exemption." *Id.*

However, this is not a case of simple deletion of a provision in a proposed bill by Congress. Rather, Congress *replaced* the deleted language with an express reference to chapter 35 in the list of applicable sections of the Code. As explained above, pages 3 to 8, that inclusion in the statute extends the state exemption to tribes. Thus, the deletion had no substantive effect since it was replaced with equally effective language.

Finally, a word about whether the construction we urge here would result, as the Government has contended, in an exemption by implication. States are expressly exempt from taxation in chapter 35. IGRA provides that that tribes are to

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[14] Tribes have been exempted from certain federal excise taxes by according them the same standing as states through the Indian Tribal Governmental Tax Status Act. *See* 26 U.S.C. § 7871. It was not necessary for Congress to amend the Indian Tribal Governmental Tax Status Act (as suggested in *Chickasaw, supra*, at 882, and the Government in its brief (Resp't Br. on *Cert.*, pp. 9-10)), since it accomplished the same result through the enactment of 25 U.S.C. § 2719(d)(1).

[15] Congress deleted the word "taxation" while at the same time adding an express reference to "chapter 35."

be treated as states for purposes of that chapter. Giving tribes the same standing is not an implication, but the express will of Congress.

CONCLUSION

For reasons stated above the judgment of the Court of Appeals should be reversed.

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On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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IN THE

Supreme Court of the United States

No. 00-507

THE CHICKASAW NATION and
THE CHOCTAW NATION OF OKLAHOMA,
Petitioners,

v.

THE UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF *AMICI CURIAE* TOWNS OF LEDYARD, NORTH STONINGTON, AND PRESTON, CONNECTICUT SUGGESTING AFFIRMANCE

Pursuant to Rule 37 of this Court, *amici curiae* Towns of Ledyard, North Stonington, and Preston, Connecticut ("Towns") submit their brief suggesting affirmance in this case. The parties have consented to the filing of this brief.

Pursuant to Supreme Court Rule 37.4, no motion for leave to file this *amicus curiae* brief is necessary where the brief is submitted on behalf of entities such as the Towns in this case.

INTEREST OF *AMICI CURIAE*

Ledyard, North Stonington, and Preston are small towns in eastern Connecticut. The Towns are well situated to address the effects of implementation of the Indian Gaming

Regulatory Act ("IGRA") and other laws regarding federal Indian law and policy as they are at the center of the burgeoning growth of gambling on tribal lands, growth that has had profound impacts on their communities.

In 1976 a group asserting that it comprised the descendants of the Pequot Tribe of Indians filed a lawsuit in the Connecticut alleging that land within Ledyard had been transferred out of tribal ownership unlawfully during the nineteenth century. To implement Settlement of the lawsuit in 1983, Congress enacted the Connecticut Indian Land Claims Settlement Act ("Settlement Act"). 25 U.S.C. §§ 1751-1760.

The Settlement Act among other things extended federal recognition to the Mashantucket Pequot Tribe and directed the Secretary of the Interior to take into trust certain land in Ledyard as a reservation for the Tribe. In 1992, four years after the enactment of IGRA, the Mashantucket Pequot Tribe opened a casino on the reservation. Today, Foxwoods, the tribe's casino, is reported to be the largest gambling casino in the world and generating annual revenues in excess of $1 billion. *See* J. Benedict, *Without Reservation: the Making of America's Most Powerful Indian Tribe and Foxwoods, the World's Largest Casino* (2000); K. Eisler, *Revenge of the Pequots, How a Small Native American Tribe Created the World's Most Profitable Casino* (2001).

Foxwoods has a number of adverse impacts on the Towns. Because the casino is on reservation land, it is exempt from all local and state environmental, land use, public health and safety, and zoning regulation. As a result, a very large casino was built without regard to local planning and other restrictions, transforming the formerly bucolic New England communities into an around-the-clock gaming mecca. In addition, the Towns gain no tax revenues from this resort. Thus, they are forced to absorb substantial demands on their services, such as traffic control, police, emergency services,

social services, and others, without the assistance of the revenues that would normally be derived from such development.

To compound these problems, Foxwoods was quickly followed by another IGRA casino, the Mohegan Sun, only a few miles away. Two other Indian groups, the Eastern Pequots and Paucatuck Eastern Pequots of North Stonington, are currently seeking federal recognition as tribes with the expectation that they will open their own IGRA casinos. Both groups' recognition efforts are financed by non-Indian gaming developers. An additional five Indian groups claiming Pequot descent and land bases in or near the Towns are standing in line to gain federal recognition.

To expand its operations at Foxwoods, in 1993 the Mashantucket Pequot Tribe requested the Secretary of the Interior to take into trust 265 additional acres of land within Ledyard, North Stonington, and Preston. The Secretary agreed to do so. The Towns and the State of Connecticut eventually filed suit that has, since 1995, enjoined the Secretary's decision to take the land into trust.

In *Connecticut v. U. S. Department of the Interior*, 228 F.3d 82 (2d Cir. 2000), *cert. denied*, __U.S.__, 121 S. Ct. 1732 (2001), the Second Circuit held that Congress did not intend the Settlement Act to limit the Secretary's authority to take additional land into trust. In part, the court reached that result by applying the Indian canon of construction to determine that ambiguities in the text of the Settlement Act be resolved in favor of the Mashantucket Pequot Tribe. *Id.* at 92. The case has been remanded to the district court for consideration of other issues, including questions arising under IGRA. In its initial defense of the Secretary's 1995 decision, the Department of Justice argued that the Indian canon should be applied to reach a result favorable to the Tribe.

Because their lawsuit against the Secretary remains ongoing, Ledyard, North Stonington, and Preston have a direct and immediate interest in the Court's determination of the extent to which federal courts should resort to the Indian canon to resolve ambiguities in the texts of statutes that affect Native American interests. *Amici* take no position on the substantive taxation issue in the case.

SUMMARY OF ARGUMENT

Amici urge the Court to clarify the proper application of the Indian canon of statutory construction by limiting its use to factual circumstances similar to those of its judicial origin. The Indian canon was first articulated by this Court in the first half of the Nineteenth Century to construe Indian treaties that for the most part took land from Indians and that resulted from unequal bargaining power between the United States and impoverished, uneducated and unrepresented Indian tribes. Similar to the canon of construction that courts interpret ambiguous contracts against the drafter, the Indian canon was historically a logical means for construing the intent of treaties or agreements negotiated by Indians in a fashion that favored the disadvantaged party.

Over the years, application of the Indian canon migrated, often to determine the outcome of disputes, to a means of discerning the intent of Congress in enacting legislation. Perhaps this migration makes some sense where Indians with some cognizable disadvantage or inequality of bargaining power were directly involved in the legislative process. However, for most modern legislation, particularly statutes like IGRA that were developed with active participation by well-represented tribes with a primary function of regulating Indian conduct, application of the canon to favor an Indian position is not supportable by logic or any line of reasoning related to the interpretation of an agreement to favor the party with lesser bargaining power.

The history of IGRA demonstrates that Congress strove to balance a number of competing interests in drafting the legislation. It solicited and weighed a range of Indian views that appear to have been ably and comprehensively presented. Under all the circumstances that existed at the time IGRA was enacted in 1988, there is no factual basis for applying a presumption in favor of Indians in judicial construction of a statute regulating Indian gambling. *Amici* respectfully submit that the Indian canon of construction should not be applied in this case.

ARGUMENT

I. OVER TIME, THE INDIAN CANON HAS BEEN APPLIED TO CIRCUMSTANCES THAT ARE INCONSISTENT WITH ITS THE ORIGIN.

A. Introduction

The object of statutory construction is to interpret the statutory text "to give effect to the will of Congress." *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 570 (1982). The "first step" in that process is to determine whether a statutory text "has a plain and unambiguous meaning." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997). If the meaning is plain and unambiguous, "that is the end of the matter," *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984), and "the judicial inquiry is complete." *Connecticut National Bank v. Germain*, 503 U.S. 249, 254 (1992).

When the meaning of a statute is ambiguous this Court has employed various tools of construction. In some instances, it is presumed that Congress intended to delegate to the agency responsible for administering a statute the authority to clarify the ambiguity. *F.D.A. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000). If the agency's interpretation is reasonable, the Court must defer to the interpretation. *Chevron*, 467 U.S. at 843-844. Resort to the Indian canon of

construction is another means of resolving ambiguity and in this case it conflicts with the *Chevron* doctrine.

This case provides an opportunity for the Court to re-examine the original purpose of the Indian canon. In so doing, the Court can decide the extent to which it is appropriate to invoke the canon to presume the intent of Congress embodied in statutes. That re-examination will reveal that during the twentieth century the use of the canon has been expanded to apply to situations that bear no factual similarity to the circumstances that caused the Court to create the canon. It also will reveal that applying the canon to presume the intent of Congress in modern legislation no longer fairly or accurately achieves the canon's intended result.

The Indian Commerce Clause of the United States Constitution grants Congress plenary authority to decide the policies of the United States government in dealing with Native American peoples. *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343 (1998). Over the past 212 years, Congress has exercised its Indian Commerce Clause authority by enacting hundreds of statutes.

Many of those statutes advantage Native Americans. *See, e.g.*, Nontercourse provision of 1790 Trade and Intercourse Act, 25 U.S.C. § 177 (prohibiting unauthorized sale by Native Americans of land subject to aboriginal title); Indian Reorganization Act of 1934, 25 U.S.C. §§ 461, *et seq.* (*inter alia* establishing loan fund to "promot[e] the economic development of . . . tribes and their members"); Native American Graves Protection and Repatriation Act of 1990, 25 U.S.C. §§ 3001, *et seq.* (mandating the return of Native American artifacts and human remains to tribes). Other statutes disadvantage Native Americans. *See, e.g.*, Indian Removal Act of 1830, ch. 148, 4 Stat 411 (authorizing the President to relocate Native Americans to land west of the Mississippi River); Act of March 3, 1863, 12 Stat. 765, 767 (withdrawing jurisdiction from Court of Claims to adjudicate

claims "growing out of or dependent on any treaty stipulation entered into with . . . the Indian tribes"); Act of June 17, 1954, ch. 303, 68 Stat. 250 (repealed 1973) (terminating Menominee Tribe of Wisconsin). And still others both advantage and disadvantage Native Americans. *See, e.g.*, General Allotment Act of 1887, ch. 119, 24 Stat. 388 (authorizing the President to allot reservation land over tribal objection and then to sell "surplus" land, while granting citizenship to Native Americans who lived "separate and apart from any tribe" and had "adopted the habits of civilized life").

Because in some statutes Congress seeks to favor Indians and in others it does not, it makes little sense mechanically to apply an interpretive presumption in favor of Indians ostensibly to discern congressional intent.

B. Original Purpose of the Canon

For the first one-hundred years of this nation's existence, Congress often exercised its Indian Commerce Clause authority to clear the public domain of Native Americans. Between 1778 and 1871, treaties were the means Congress employed to accomplish that objective. United States commissioners negotiated with the leaders of Indian tribes in an effort to persuade the leaders to cede their tribe's aboriginal title to the land its members used and occupied. When an agreement was reached, the commissioners wrote the terms into a document denoted a "treaty." Treaties were ratified by the Senate.

As noted in *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 630-31 (1970), "[t]he Indian Nations did not seek out the United States and agree upon an exchange of lands in an arm's-length transaction. Rather, treaties were imposed upon them and they had no choice but to consent." Describing the reality of that process, in *Jones v. Meehan*, 175 U.S. 1 (1899), the Court acknowledged that,

> the negotiations for [every] treaty [were] conducted, on the part of the United States, an enlightened and powerful nation, by representatives skilled in diplomacy, masters of a written language, understanding the modes and forms of creating the various technical estates known to their law, and assisted by an interpreter employed by themselves; that the treaty is drawn up by them and in their own language; that the Indians, on the other hand, are a weak and dependent people, who have no written language and are wholly unfamiliar with all the forms of legal expression, and whose only knowledge of the terms in which the treaty is framed is that imparted to them by the interpreter employed by the United States.

Jones, 175 U.S. at 11.

In 1832 the Court in *Worcester v. Georgia*, 31 U.S. 515 (1832), decided the meaning of an ambiguous portion of the text of the Treaty of Hopewell. Given the disparity between the negotiating positions of the U. S. commissioners and the Indian negotiators, the Court admonished that "[t]he language used in treaties with the Indians should never be construed to their prejudice." To avoid doing "injustice to the understanding of the parties," how "the words of the treaty were understood by this unlettered people rather than their critical meaning, should form the rule of construction." 31 U.S. at 582. This was not a new legal concept. The Court in *Worcester* simply extended to agreements that U.S. commissioners negotiated with representatives of Indian tribes the common law rule that ambiguous texts of contracts be construed against the party who drafted the disputed language. *See, e.g.*, 2 *Blackstone's Commentaries*, 380 (1809); *Noonan v. Bradley*, 76 U.S. 394, 407 (1870) (citing as authority for the rule, *Mayer v. Isaac*, 6 Meeson & Welsby 605, 612, 151 English Reports 554, 557 (1840)).

Thirty-four years later when a dispute arose over the meaning of the phrase "levy, sale, execution, and forfeiture"

in an 1854 treaty that had been negotiated with the Miami Indians, the Court reaffirmed the treaty-interpretation rule announced in *Worcester*. *The Kansas Indians*, 72 U.S. 737, 760 (1867). In 1899 in *Jones v. Meehan*, the Court, again citing *Worcester*, reaffirmed that an Indian treaty must "be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians." 175 U.S. at 11.

Disputes about the meaning of ambiguous texts of Indian treaties that were negotiated in the nineteenth century continue to the present day. When those disputes have reached the Court, it has continued to employ the rule of *Worcester v. Georgia*. *See, e.g., Choctaw Nation v. Oklahoma*, 397 U.S. 620, 631 (1970) (noting that the Court "has often held that treaties with the Indians must be interpreted as they would have understood them, and any doubtful expressions in them should be resolved in the Indian's favor"); *accord, Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 194 n. 5. (1999).

After the Civil War, the House of Representatives objected to the further use of treaties to implement Indian policy. In 1871, the Senate agreed that no new treaties would be negotiated. 16 Stat. 544, 566 (1871). As a consequence, United States commissioners continued to negotiate arrangements with representatives of Indian tribes for the cession of the tribes' aboriginal lands. But rather than "treaties," the arrangements were called "agreements." And rather than obtaining ratification by the Senate, the agreements were approved by both Houses through the enactment of statutes.

In all other respects, Indian agreements after 1871 were the same as earlier Indian treaties. The disparity of negotiating positions between United States commissioners and Indian negotiators was the same, and Indian representatives continued to lack formal education, English language proficiency and legal training. For these reasons, when

disputes about the meaning of ambiguous texts of agreements reached the Court, it continued to apply the rule established in *Worcester v. Georgia*. *See Winters v. United States*, 207 U.S. 564, 576 (1908) (holding that "[b]y a rule of interpretation of agreements and treaties with the Indians, ambiguities occurring will be resolved from the standpoint of the Indians"); *accord, Choate v. Trapp*, 224 U.S. 665, 675 (1912); *DeCoteau v. District County Court for the Tenth Judicial District*, 420 U.S. 425, 447 (1975).

C. In the Twentieth Century, the Court has Applied the Indian Canon in Factual Circumstances that are Inconsistent with Its Original Purpose.

In 1887, William Duncan, an Anglican missionary, settled with 800 Canadian Tsimshean Indians on Annette Island in southeast Alaska. At Duncan's urging, in 1888 Representative Byron Cutcheon introduced a bill whose enactment would withdraw Annette Island for the use of Duncan "and those native people who have recently emigrated with him from British Columbia." H.R. 8193, 50th Cong. (1888). In 1891, Congress enacted section 15 of Chapter 561, 26 Stat. 1101. In language nearly identical to the language of the Cutcheon bill, section 15 withdrew "the body of lands known as Annette Islands."

In 1916, a California corporation erected a fish trap in waters offshore Annette Island, and the United States filed suit to have it removed. In *Alaska Pacific Fisheries v. United States*, 248 U.S. 78 (1918), the Court determined that Congress had enacted section 15 to enable the Tsimshean Indians to "become self-sustaining" and that, since the Indians were fishermen, their exclusive use of the waters surrounding Annette Island was essential to the achievement of Congress's objective. On that basis, the Court concluded that Congress intended the phrase "the body of lands known as Annette Islands" to include the surrounding waters.

But in so holding, the Court noted that its "conclusion has support in the general rule that *statutes* passed for the benefit of dependent Indian tribes or communities are to be liberally construed, doubtful expressions being resolved in favor of the Indians." 248 U.S. at 89 (emphasis added). In support of that contention, the Court cited *Choate v. Trapp*. But in *Choate*, the Court had applied the rule of *Worcester v. Georgia* for construing an *agreement* that had been negotiated with an Indian tribe, and which then had been approved by Congress by the enactment of a statute.

Applying the *Worcester* rule to construe the intent of Indian negotiators embodied in agreements they did not write made sense, regardless of the means by which Congress chose to approve the arrangement. *Alaska Pacific Fisheries* provides no guidance on why that concept might be extended to discern the intent of Congress in enacting an 1891 statute regarding the meaning of the phrase "the body of lands known as Annette Islands." Yet, since *Alaska Pacific Fisheries*, the Court has on occasion invoked the *Worcester v. Georgia* rule to presume the intent of Congress in twentieth century statutes that do not codify any agreement negotiated by disadvantaged Indians.

In *Ramah Navajo School Board v. Bureau of Revenue of New Mexico*, 458 U.S. 832 (1982), the Court held that Congress intended its enactment of the Indian Financing Act in 1974 and of the Indian Self-Determination and Education Assistance Act in 1975 implicitly to preempt the authority of states to impose a gross receipts tax on non-Indian contractors who construct Indian schools. In so holding, the court noted that it had "consistently admonished that federal statutes and regulations relating to tribes and tribal activities must be 'construed generously in order to comport with . . . traditional notions of [Indian] sovereignty and with the federal policy of encouraging tribal independence.'" 458 U.S. at 846 (citation omitted and emphasis added). As authority for that

proposition the Court cited *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980), *McClanahan v. Arizona Tax Commission*, 411 U.S. 164 (1973), and *Warren Trading Post Co. v. Arizona Tax Commission*, 380 U.S. 685 (1965).

But in *Warren Trading Post* the Court made no mention of *Worcester v. Georgia*. In *McClanahan* the Court employed the rule to construe an 1868 treaty. And in *White Mountain Apache Tribe* the Court noted that "[a]mbiguities in federal law have been construed generously in order to comport with these traditional notions of sovereignty and with the federal policy of encouraging tribal independence," 448 U.S. at 143-44 (citing *McClanahan*), which employed the canon to interpret a treaty, rather than a statute.

Relying on decisions of this Court that, upon analysis, do not support the principle for which they have been cited, in recent years circuit courts have invoked the Indian canon of construction to presume the intent of Congress in all sorts of legislation. For example, in *Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455, 1461-62 (10th Cir. 1997), the Tenth Circuit employed the rule to interpret the intent of Congress in amendments to the Indian Self-Determination and Education Assistance Act enacted in 1988. To justify doing so, the court asserted that "[t]his canon of statutory construction is 'rooted in the unique trust relationship between the United States and the Indians.'" 112 F.3d at 1462 (citation omitted). But as authority for that proposition, the court cited *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226 (1985), another case in which this Court interpreted the intent of the negotiators embodied in a treaty, rather than the intent of Congress in a statute.

In *DeCoteau v. District County Court for Tenth Judicial District*, 420 U.S. 425, 447 (1975), the Court noted that even in situations in which courts are required to interpret the intent of agreements that were negotiated with Indian tribes in the nineteenth century, the invocation of the Indian canon of

construction "is not a license to disregard clear expressions of . . . congressional intent." And more recently in *Oregon Dept. of Fish and Wildlife v. Klamath Indian Tribe*, 473 U.S. 753 (1985), the Court accepted the proposition that the Indian canon should be used to interpret an 1864 treaty and a 1901 agreement. *Id.* at 766. But the Court then used traditional means of statutory construction to construe both documents.

Significantly, with respect to the 1901 agreement, the Court noted that "[t]he Tribe was represented by counsel, the tribal negotiating committee members spoke and understood English, and the Tribe secured a number of alterations to the United States' original proposals." 473 U.S. at 772. The Court also noted that, in addition to fulfilling obligations that the 1864 treaty imposed, Congress's enactment of the statute that approved the 1901 agreement "was motivated by additional goals," one of which was ensuring that non-Indians were treated fairly. *Id.* at 771-72.

A similar well-reasoned principle was applied in *United States v. Atlantic Richfield Co.*, 612 F.2d 1132 (9th Cir.), *cert. denied*, 449 U.S. 888 (1980). In that case construing the Alaska Native Claims Settlement Act, the Ninth Circuit ruled that the Indian canon should, at the very least, be diminished for a contemporary statute in which the Native American interests were well represented:

> The rule of construction of ambiguous statutes in favor of Indians is based on a concern that the powerful not take advantage of the helpless and uneducated. A similar concern guides modern law on the construction of contracts of adhesion. Where, as here, the Inupiats were represented before Congress by such illustrious counsel as former Supreme Court Justice Arthur Goldberg and former Attorney General Ramsey Clark, we think the rule of construction operates with less force.

612 F.2d at 1139.

Since *Alaska Pacific Fisheries*, a rule articulated at the beginning of the nineteenth century to shield Indian negotiators from unfair disadvantage has been transformed into a sword that frequently is invoked to override or misconstrue the intent of Congress. The lower courts have followed an inconsistent and ill-defined path, through which the original intent of the canon has been obfuscated and lost. The intent of Congress in statutes, like IGRA, that affect Native American interests, may also have been to advance non-Native American-related policy objectives and developed through a legislative process in which Indian interests were amply represented and defended. In such circumstances, the canon should find no application.

The petitioners also claim that the canon derives from the unique trust relationship between tribes and the United States. This assertion likewise does not withstand scrutiny. In *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831), the Court observed that Indians who resided east of the western boundary of the United States were, in the Court's words,

> in a state of pupilage; their relation to the United States resembles that of a ward to his guardian. They look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants; and address the president as their great father.

30 U.S. at 17.

Over the succeeding 170 years, *Cherokee Nation* has been cited as authority for the proposition that the United States has a trust responsibility to protect the interests of Native Americans. *See, e.g., Nevada v. United States*, 463 U.S. 110, 142 (1983) (theorizing that "[t]he United States undoubtedly owes a strong fiduciary duty to its Indian wards"). But the application of the trust responsibility doctrine has been fraught with inconsistency and confusion. It is clear that Congress has no general duty to enact statutes that benefit Native Americans. *See, e.g., United States v. Mitchell*, 445

U.S. 535, 542-46 (1980) (holding that the scope of the trust responsibility is to be decided by Congress and Congress did not intend the General Allotment Act to impose a duty on the Secretary of the Interior to manage natural resources on Indian allotments). Nevertheless, in this appeal petitioners assert that in *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 247 (1985), the Court decided that the trust responsibility requires the judiciary to presume that Congress intends ambiguities in statutes such as the IGRA to be resolved at all times and for all purposes in favor of Native Americans; no matter the countervailing policy considerations. However, *County of Oneida* cannot bear that weight. A careful reading of the decision indicates that the cases cited in *Oneida* are authority for the less controversial propositions that ambiguities in the texts of Indian treaties are to be resolved against the United States negotiators, and that statutes claimed to abrogate treaties or extinguish aboriginal title demonstrate the clear intent to effectuate those results.

II. THE HISTORY OF THE INDIAN GAMING REGULATORY ACT DEMONSTRATES THAT IT IS INAPPROPRIATE TO INVOKE THE INDIAN CANON TO DISCERN THE INTENT OF CONGRESS IN THAT STATUTE.

As originally articulated in 1832, the Indian canon redressed the fact that Indian negotiators were unfairly disadvantaged during treaty deliberations. One might posit that the Court's application of the Indian canon in *Alaska Pacific Fisheries* reflected implicit recognition that the Tsimshean Indians who benefited from the 1891 statute had no opportunity to communicate to Congress their interest in the withdrawal of Annette Island. For the first half of the twentieth century, few Native Americans actively participated in the legislation process through which statutes are enacted into law. But for at least the past twenty years or so that no longer has been the case.

Indian tribes have for some years operated an effective lobby on Capitol Hill. Composed of tribal representatives, attorneys, and professional lobbyists, during each session of Congress the Native American lobby competes, including by distributing campaign contributions,[1] on a level playing field against other lobbies to ensure that Native American interests are considered when Congress balances competing policy objectives during the drafting of legislation.

In *Circuit City Stores, Inc. v. Adams*, __ U.S. __, 121 S. Ct. 1302, 1311-1312 (2001), the Court recently observed:

> We ought not to attribute to Congress an official purpose based on the motives of a particular group that lobbied for or against a certain proposal—even assuming the precise intent of the group can be determined, a point doubtful . . . as a general rule. . . . It is for the Congress, not the courts, to consult political forces and then decide how best to resolve conflicts in the course of writing the objective embodiments of law we know as statutes.

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[1] For example, according to the Center for Responsive Politics, seven of the top twenty gambling organizations that gave campaign contrib.-utions to the political parties and candidates during the 2000 election were Indian tribes that operate gambling casinos.

Rank	Organization	Amount
5	Mashantucket Pequot Tribe	$514,948
7	Seminole Tribe of Florida	350,000
14	Mississippi Band of Choctaw Indians	152,000
15	Eastern Band of Cherokee Indians	147,000
16	Morongo Band of Cahuilla Mission Indians	146,000
18	Pechanga Band of Luiseno Mission Indians	130,000
19	Viejas Tribal Government	107,300

See http://www.opensecrets.org/industries/contrib.asp?Ind=N07

The history of Native American participation in the legislative process that resulted in enactment of IGRA demonstrates that the continued invocation of the Indian canon to resolve all ambiguities in the texts of all statutes that affect Native American interests contradicts the admonition expressed in *Circuit City Stores* by aligning the Court with the policy aspirations of one lobby to the unfair detriment of all others.

In *Seminole Tribe of Florida v. Butterworth*, 658 F.2d 310 (5th Cir. 1981), *cert. denied*, 461 U.S. 929 (1983), the Fifth Circuit held that the State of Florida had no jurisdiction to regulate gaming on Indian reservations. In response to *Seminole Tribe*, in 1983 Representative Udall, chairman of the House Committee on Interior and Insular Affairs, introduced H.R. 4566, a bill to regulate tribal gaming activities. Representative Udall explained that he neither "support[ed] or oppose[d] gambling activities in Indian country." He also explained that he "unders[tood] that there will be some Indian criticism and objection to this legislation." 129 Cong. Rec. 34184-85 (1983).In 1984 the House Committee on Interior and Insular Affairs held a hearing on H.R. 4566. Of nine witnesses, six represented tribes or Native American organizations, including the National Tribal Chairmen's Association and the National Congress of American Indians. Nine other tribes and Native American organizations submitted written statements. *Indian Gaming Control Act: Hearing on H.R. 4566 Before the House Committee on Interior and Insular Affairs*, 98th Cong. (1984).

At the beginning of the 99th Congress in 1985, Representative Udall reintroduced H.R. 4566 as H.R. 1920, and the Committee held two additional hearings on the bill. Of forty-five witnesses, thirty represented tribes. *Indian Gambling Control Act: Hearings on H.R. 1920 and H.R. 2404 Before the House Committee on Interior and Insular*

Affairs, 99th Cong. (1985). In 1986 the Committee reported an amendment in the nature of a substitute for the original text of H.R. 1920. H.R. Rep. No. 99-488 (1986). Rather than being uncritically pro-Indian, the substitute was drafted to balance a number of competing policy objectives. As the Committee's report on the substitute explains:

> Indian tribes initially opposed the legislation as an unwarranted intrusion upon tribal governmental sovereignty and an impairment of legal rights confirmed through extensive litigation in the Federal courts. Tribal support did develop on the legislation . . . . On the other side, opposition to the bill was advanced by some State governmental representatives and certain private interest groups because of their concern about the impact of Indian gaming activity not being subject to the regulatory and enforcement laws of the States . . . After full Committee hearings on the legislation and the receipt of extensive correspondence from concerned parties, the Committee concluded that many of the concerns expressed on both sides of the issue had merit and warranted consideration in the amendatory process. At the direction of the Chairman, an amendment in the nature of a substitute was developed for Committee mark-up purposes. The Substitute sought to strike a middle ground between the opposing viewpoints.

Id. at 23-24.

The House passed the Committee's substitute on a voice vote, 132 Cong. rec. 8179-88 (1986). In the Senate, the Select Committee on Indian Affairs held a hearing on a companion bill. Of fifty-five witnesses, forty-one represented tribes. The Committee then reported a substitute for H.R. 1920. S. Rep. No. 99-493 (1986). But the Senate took no action on the substitute because the bill was opposed by the U.S. Department of Justice, *see id.* at 22-27, as well as by two members of the Committee. *Id.* at 32.[2]

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[2] The Select Committee later explained:

> Subsequent to reporting the bill, and in further response to administration and State concerns, additional changes were recommended by the Chairman of the Indian Affairs Committee. However, despite efforts to negotiate changes that were acceptable to all parties, the bill was not considered by the Senate prior to adjournment of the 99th Congress.

S. Rep. No. 100-446, at 4 (1988).

In the 100th Congress, in 1987, two Indian gaming bills were introduced in the Senate on which the Select Committee on Indian Affairs held a hearing. Of twenty-six witnesses, eleven represented tribes or Native American organizations, including the National Indian Gaming Association. The Committee then reported a new substitute which passed first the Senate and then the House on voice votes. *See* S. Rep. No. 100-446 (1988); 134 Cong. Rec. 24016-37, 25781 (1988).

The Select Committee's report explaining the substitute expressed the hope that district courts would resolve disputes regarding whether a State had negotiated in "good faith" with a tribe to develop a gaming compact by resolving factual uncertainties in favor of the tribe. S. Rep. No. 100-446, at 15 (1988).[3] Extrapolating from that snippet of legislative history, the petitioners assert that "it is inconceivable that Congress did not also intend for the Indian-law canons (sic) to apply to IGRA *in toto*." Brief on the Merits for Petitioners, at 14.

In any event, as the history of the 98th, 99th, and 100th Congresses' consideration of bills to regulate Indian gaming demonstrates, the 100th Congress intended no such result. The Select Committee's report acknowledges that during three Congresses "[t]he regulation of gaming activities on Indian lands ha[d] been the subject of much controversy."

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[3] *Bath Iron Works Corp. v. Office of Workers' Compensation Programs*, 506 U.S. 153, 166 (1993) (noting that where statute is unambiguous, Court will "give no weight to a single reference by a single [legislator] during floor debate").

S. Rep. No. 100-446, at 5. The report also correctly observed that "it is the responsibility of the Congress, consistent with its plenary power over Indian affairs, *to balance competing policy interests*." *Id.* at 3 (emphasis added). That point was conceded in a 1993 oversight hearing on IGRA, where the witness for the Minnesota Indian Gaming Association who, also had served as a member of the House staff involved in enactment of the IGRA stated: "The tribes very strongly opposed that, and the Senate in attempting to - and the Congress as a whole, *in attempting to strike a balance there*, agreed to a compacting procedure that the states proposed to give them some role in regulation." *Implementation of IGRA: Oversight Hearing before the Subcomm. on Native American Affairs of the House Comm. on Natural Resources*, 103d Cong. 12, 33 (1993) (statement of F. Ducheneaux). None of the factual circumstances that informed the Court's articulation of the Indian canon in *Worcester v. Georgia* were applicable to the enactment of IGRA.

Since the enactment of IGRA, the interests associated with gaming have become some of the most powerful and significant political forces operating on the federal scene. For example, in hearings on IGRA reauthorization in recent years, numerous Indian tribes and organizations have participated in oversight hearings and proposed amendments to IGRA.[4]

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[4] *Indian Gaming Regulatory Improvement Act of 1999: Hearing on S. 399 Before the Senate Committee on Indian Affairs*, 106th Cong. (1999) (two of three witnesses were Indians (including chairman of National Indian Gaming Association)); *Indian Gaming Regulatory Improvement Act of 1998: Hearing on S. 1870 Before the Senate Committee on Indian Affairs*, 105th Cong. (1998) (four of seven witnesses were Indian (including chairman of National Indian Gaming Association, president, National Congress of American Indians)); *Indian Gaming Regulatory Act Amendments of 1997: Hearing on S. 1077 Before Senate Committee on Indian Affairs*, 105th Cong. (1997) (seven of ten witnesses were Indian (including chairman of National Indian Gaming Commission, chairman of National Indian Gaming Association, and first vice-president, National Congress of American Indians)). A partial list of hearings before Congress on IGRA, including the Indian participation, is as follows: *Gaming Regulatory Act Amendments of 1995: Hearing on S. 487 Before the Senate Comm. on Indian Affairs*, 104th Cong. (1995) (seven of 12 witnesses were Indians); *Implementation of Indian Gaming Regulatory Act: Oversight Hearing Before the Subcomm. on Native American Affairs of the House Comm. on Natural Resources*, Parts V and VI, 103d Cong. (1993 and 1994) (11 of 34 witnesses were Indian (including executive director of the National Indian Gaming Association); *Indian Gaming Regulatory Act: Hearing Before the Senate Comm. on Indian Affairs*, Part II, 103d Cong. (1994) (11 of 15 witnesses were Indian (including chairman of Minnesota Indian Gaming Association, president of NCAI, and chairman of National Indian Gaming Association)); *Indian Gaming Regulatory Act Amendments: Hearing on S. 2230 Before the Senate Comm. on Indian Affairs*, Parts I and II, 103d Cong. (1994) (19 of 51 witnesses were Indian (including president of NCAI, chairman of National Indian Gaming Association, and Frank Ducheneaux)); *Implementation of Indian Gaming Regulatory Act: Oversight Hearing Before the Subcomm. on Native American Affairs of the House Comm. on Natural Resources*, Parts I through IV, 103d Cong. (1993) (33 of 67 witnesses were Indian (including Kevin Gover, representing Pueblo of Tesuque, New Mexico, the president of NCAI, the chairman of the National Indian Gaming Association)); *Implementation of Indian Gaming Regulatory Act: Oversight Hearing on Status of the Activities Undertaken to Implement the Gaming Regulatory Act Before the Senate Select Comm. on Indian Affairs*, Part I, II and III, 102d Cong. (1992) (28 of 66 witnesses were Indian (including chairman and vice chairman of the National Indian Gaming Association)); *Implementation and Enforcement of the Indian Gaming Regulatory Act, Public Law 100-497: Oversight Hearings on Implementation and Enforcement of the Indian Gaming Regulatory Act, Public Law 100-497 Before the House Comm. on Interior and Insular Affairs*, 102d Cong. (1992) (18 of 27 witnesses were Indian (including chairman of the National Indian Gaming Association)).

It would truly be a perverse twist in logic to construe a law such as IGRA, whose evolution is now influenced by extraordinarily well-financed, ably-represented tribes and Indian organizations, under the same theory that was developed by this Court to protect disadvantaged and under-represented tribes who entered into treaties with the United States. Today, in laws such as IGRA, the playing field has been leveled, and the canon should find no application.

CONCLUSION

"[C]anons of construction are no more than rules of thumb that help courts determine the meaning of legislation" *Connecticut National Bank v. Germain*, 503 U.S. 249, 253 (1992). As the history of the enactment of IGRA demonstrates, any presumption that Congress always intends the ambiguity in modern legislation affecting Native American interests to be resolved in favor of the Indians bears no factual relationship to the reality of the legislative process.

For these reasons, *amici* Ledyard, North Stonington, and Preston respectfully urge the Court to clarify that the Indian canon should not be applied to discern the intent of Congress in passing IGRA.

Respectfully submitted,

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